CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 39

JEAN McNEIL PEPPER, PETITIONER,

vs.

SCOTT LITTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1939.

CERTIORARI GRANTED JUNE 5, 1939.

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TRANSCRIPT OF RECORD

At a District Court of the United States for the Western District of Virginia, at the May term, 1938, thereof, held in Big Stone Gap.

Present: Honorable John Paul, District Judge.

Among other proceedings had were the following to-wit:

In the Matter of

Dixie Splint Coal Company, Bankrupt.—In Bankruptcy No. 846.

Scott Litton, Creditor, Plaintiff,

v.

Jean McNeil Pepper, Objecting Creditor, Defendant.

STIPULATION AS TO PETITION FOR ADJUDICATION.

(2)

(Petition filed September 4, 1934).

It is stipulated that a voluntary petition for adjudication of bankruptcy executed and sworn to by Scott Litton as president of Dixie Splint Coal Company, with Quillen and Quillen of Lebanon, Virginia, listed as counsel for the proposed bankrupt, was filed September 4, 1934, and an order of adjudication was entered thereon September 7, 1934.

The petition recites:

"That this petition is filed pursuant to a resolution passed by the Board of Directors at a regular meeting held on the 16th day of June, 1934 *"

Summary of Debts and Assets show: Taxes due State, County, etc. $71.21, Wages $2,883.44, Unsecured Claims $49,914.38, making total debts: $52,869.03. Assets: Bills, Notes, etc., $1,361.00. Open Accounts, $10,807.36, Unliquidated Claims, $961.50, Deposits of Money in Banks, $4500.50, making total assets: $17,630.36. Unsecured claims composed of: Appalachian Electric Power Company, account, $1,604.67, Superior Sterling Company account, $1.96, Commercial Acetylene Sup. Company, account, $1.62, Scott Litton, account, $922.22, Scott Litton judgment and interest, $35,973.46, Jean McNeil Pepper judgment and interest, $11,410.45.

Unliquidated Claim is: "Amount in hands of E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, paid into Court by M. C. Chafin, D. S., being the residue of the proceeds of execution sale of the tangible personal property of the Corporation, $961.50."

Of the above $4500.50, deposits of money in bank, the sum of $3677.67 was in the insolvent Dickenson County Bank, Clintwood, Va., none of which was collected by the Trustee.

MINUTES FIRST CREDITORS' MEETING SEPTEMBER 26, 1934.

(3) Filed September 27, 1934.

Minutes show notice to all listed creditors, those present, and following general claims filed:

Appalachian Electric Equip. Co., C. C. Burns Atty.,	$1,694.15
Commercial Ascetylene Supply Co., Inc., Atlanta, Ga.,	1.86
Superior Sterling Company, Bluefield, W. Va.	15.83

(Note: Said three general claims were withdrawn prior to 11-7-1934.)

And following preferred or secured claims filed:

Price Brothers, Cleveland, Va.,	$ 1,222.00
Scott Litton, Lebanon, Va.	33,468.89

Sundry claims for labor performed within 90 days of bankruptcy were filed, and set out in the minutes, these labor claims having been assigned to Price Brothers ****** The minutes then state:

The election of a trustee being called for Mr. P. H. Smith, Clinchfield, Va., was elected trustee and his bond fixed at the sum of $10,000.00. The trustee was directed to take charge of all of the bankrupt's property whereever situated and to file such report or petition concerning the same with the referee as the trustee and his attorney may deem advisable.

The trustee was directed to collect all accounts receivable due the bankrupt and deposit the funds collected to his credit in this matter in Dominion National Bank, Bristol, Virginia. Mr. Smith, the Trustee, asked leave to employ Mr. I. M. Quillen, Lebanon, Virginia, as his attorney and this leave is hereby granted.

Mr. Quillen stated that there were certain suits pending in different courts involving the assets of the bankrupt and that he deemed it advisable for the trustee to file petition asking leave to intervene in all of these suits, and stated that he would file such petition immediately and it is understood that upon the filing of such petition the referee will enter an order authorizing and directing the trustee to intervene in the suits.

It not being necessary to appoint appraisers to appraise any of the property or assets of the bankrupt at this time, no appraisers were appointed, but it is under-
(4) stood that should appraisers be hereafter required the referee will appoint same.

CLAIM OF SCOTT LITTON FOR $33,468.89, INTER-
(5) **EST AND COSTS.**

(Filed September 26, 1934.)

At Lebanon, in said District of Virginia, on the 26th day of September, A. D. 1934, came Scott Litton of Lebanon, in the County of Russell, in said District of Virginia, and made oath and says:

That the said Dixie Splint Coal Company, Incorporated, the Corporation by whom a petition for adjudication in bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said Scott Litton in the sum of THIRTY THREE THOUSAND FOUR HUNDRED SIXTY EIGHT ($33,468.89) & 89/100 DOLLARS:

That the consideration of said debt is as follows: Judgment confessed in the Clerk's Office of Russell County, Virginia, on the 2nd day of June, 1933, for the said sum of $33,468.89, with legal interest thereon from the 2nd day of June, 1933, till paid, an abstract of which said judgment is hereto attached; upon which said judgment a writ of fieri facias was duly issued from the Clerk's Office of Russell County, Virginia, on the 19th day of March, 1934, and on the said 19th day of March, 1934, at 8 o'clock P. M., placed in the hands of M. C. Chafin, Deputy for N. F. Castle, Sheriff of Russell County, Virginia, for execution, and which said execution was on the said 19th day of March, 1934, levied upon the tangible personal property of the Dixie Splint Coal Company, Incorporated, a copy of which writ is attached hereto, and pursuant to which said levy the said property was duly and regularly sold for the satisfaction of said lien; $961.70 of the proceeds of which said sale is now in the hands of E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, by virtue of which said writ of fieri facias a lien was also acquired by the said Scott Litton as of March 19, 1934, upon the sum of $868.37 on deposit in Dominion National Bank in Bristol, Virginia; to the credit of Dixie Splint Coal Company, Incorporated, and by virtue of which said writ of fieri facias a lien was

created in favor of Scott Litton as of March 19, 1934, upon the sum of $5718.19, due to the said Dixie Splint Coal Company, Incorporated, by Morris S. Hawkins and L. H. Windholz, Receivers for Norfolk Southern Railway Com-
(6) pany, that being the amount to which the said Dixie Splint Coal Company, Incorporated, became entitled to from the said Receivers prior to the 4th day of June, 1934, the return date of the said writ of fieri facias; that by virtue of the issuance of the said writ of fieri facias a lien was created in favor of said Scott Litton as of the 19th day of March, 1934, against any and all other sums due the Dixie Splint Coal Company, Incorporated, to which the said Dixie Splint Coal Company, Incorporated, became entitled on or before the 4th day of June, 1934, the return date of said writ. It is the claim of the said Scott Litton that each and all of the aforementioned liens created by the issuance of said writ came into existence more than four months prior to the filing of the bankrupt's petition, and that by virtue of the said liens he is entitled to receive payment of the said sums mentioned as a prior or preferred claim against the Bankrupt's estate, and that as to the residue remaining after the application of said sums to his debt he is entitled to share in the remaining assets of the estate as a common creditor; that no part of said debt has been paid and that there are no set-offs or counterclaims to same; that the date of maturity of the said debt is June 2, 1933; that the said Scott Litton has not, nor has any person by his order, or to the knowledge or belief of said deponent, for his use, had or received any manner of security for said debt whatever. The attorney named on the back of this proof of claim is hereby made and constituted attorney in fact for all purposes whatsoever in connection with this claim with full power of substitution.

(Signed) SCOTT LITTON,

Subscribed and sworn to before me, this 26th day of September, 1934.

(Signed) JANIE A. HARGIS,
Notary Public.

My commission expires on the 11th day of January, 1936.

See Virginia Record page 39 for judgment, and pages 102-103 for execution and return, exhibited with this claim.

PEPPER EXCEPTIONS TO LITTON CLAIM.

(Filed December 18, 1934.)

Jean McNeil Pepper, Executrix and sole devisee of the (7) estate of A. P. Pepper, deceased, a creditor of Dixie Splint Coal Company, Incorporated, by counsel except to the claim filed by Scott Litton as a prior or preferred claim in the sum of Thirty-three Thousand Four Hundred and Sixty-eight dollars and Eighty-nine cents ($33,468.89), alleged to be due him by reason of a judgment obtained by the said Scott Litton four months prior to the institution of these proceedings; and for her grounds of exception, says:

(1) That the validity of said judgment has been questioned by the Trustees of said bankrupt corporation, and is now pending; and,

(2) That should it be determined that the said alleged claim is not a prior or preferred lien claim, the same does not constitute a common claim, since the amount claimed under said judgment was never due or owing to the said Scott Litton.

Respectfully submitted,

JEAN McNEIL PEPPER,
By Counsel.

(Signed) H. G. MORISON, JR.
(Signed) WARREN & CANTWELL.

ANSWER OF LITTON TO PEPPER EXCEPTIONS.

(Filed August 23, 1937)

Comes now Scott Litton and for answer to the Exceptions of Jean McNeil Pepper to his preferred claim of

$33,468.89, interest and costs, filed herein, which exceptions were filed December 18, 1934, says;

1. Said first exception states:

"That the validity of said judgment (for $33,468.89) has been questioned by the Trustees of said bankrupt corporation, and is now pending;"

Said exception referred to the litigation then pending in the State Court, which was afterwards decided in favor of Scott Litton by the Circuit Court of Russell County, which Court was affirmed on appeal by the Supreme Court of Appeals of Virginia, and the copy of the printed record in the case of P. H. Smith, Trustee, vs. Scott Litton, June Term, 1936, and of the opinion of said Supreme Court and its order of November 12, 1936 heretofore filed in this cause, are here referred to and made a part hereof.

From said exception, and the orders of the Referee herein, and from said record, opinion and order, it appears that the question of the validity of said judgment (8) of Scott Litton against Dixie Splint Coal Company, for $33,468.89, interest and costs, and of the executions issued thereon, was, upon the petition of said Jean McNeil Pepper, submitted by the Bankruptcy Court to the Circuit Court of Russell County, Virginia, for decision, and that said Circuit Court of Russell County and the Supreme Court of Appeals of Virginia, held that the Trustee in Bankruptcy of Dixie Splint Coal Company, and Jean McNeil Pepper, were estopped from questioning the validity of said judgment and of the executions issued thereon. Therefore, Jean McNeil Pepper cannot now further question the validity of said judgment and of the executions issued thereon, the question being *res judicata*, and she being now estopped from further contesting the validity thereof.

2. If it should be held that the validity of said judgment can now be examined into, notwithstanding the defenses of *res judicata* and estoppel set out above, then Scott Litton will rely, in addition to the exhibits filed with his original preferred claim on September 26, 1934, upon the instrument confessing said judgment, dated

June 2, 1933, and set out on pages 37-38 of said printed record.

3. The statement in said second exception that "the amount claimed under said judgment was never due or owing to the said Scott Litton" is denied.

5. After said cause was decided by the Supreme Court of Appeals of Virginia, said Jean McNeil Pepper did, on February 11, 1937, file a Petition in this cause setting up two judgments in her favor against Scott Litton, one thereof for $496.97, and the other for $4,282.94, interest and costs, stating "that as doth appear from the records and papers herein, the above named bankrupt is alleged to be indebted to aforesaid Scott Litton in a large amount, and said Scott Litton has filed a proof of debt upon said alleged claim, that if said claim is allowed for payment the said Scott Litton will in due course of time receive a dividend thereon; that the proceeds of such dividend payment will probably be placed beyond the reach of your Petitioner, and she will be unable to enforce collection of her aforesaid judgments if only the ordinary process of law be used," and prayed that she be allowed to garnishee the funds in the hands of the Trustee in (9) bankruptcy belonging to Scott Litton.

By filing said Petition containing said allegations, said Jean McNeil Pepper admitted that her said exceptions first and second were not well taken, and that Dixie Splint Coal Company was indebted to Scott Litton in the amount of said judgment in his favor, and that she had no right to question the validity of said judgment for $33,468.89, interest and costs, and said Jean McNeil Pepper is now estopped from asserting either of said propositions.

Said Petition is here referred to and made a part hereof.

Respectfully submitted,

SCOTT LITTON,
By Counsel.

(Signed) HENRY ROBERTS, Bristol, Virginia
(Signed) I. M. QUILLEN, Lebanon, Virginia
(Signed) M. M. LONG, St. Paul, Virginia

AMENDED EXCEPTION OF JEAN McNEIL PEPPER TO LITTON CLAIM.

(Made at hearing before Referee August 27, 1937.)

Mr. Heuser: We would like to make a motion to amend the objection on which this evidence is being taken. In order to make the objection more timely, we would like for it to be that the claim is objected to as a secured claim on the ground that the purported judgment on which it is based is wholly and utterly void upon its face.

PETITION OF JEAN McNEIL PEPPER TO INTERVENE IN STATE COURT.

(10) (Filed October 15, 1934.)

See Virginia Record page 118-121 for this petition requesting Referee to direct Trustee to appear in Russell Circuit Court and submit question of validity of Litton judgment and execution.

For orders of Referee on said petition see Virginia Record, viz.

Order entered 10-17-34 page 117

Order (excerpt) entered 11-8-34 page 42

Order entered 12-18-34 page 43

(Clerk's Memorandum: The items specified in the foregoing as parts of the record are, by note following item 3 of the stipulation and by specific direction of counsel for the parties, omitted from this transcript of the record and are vouched to the Court by the record in the case of P. H. Smith, Trustee, etc., v. Scott Litton, in the Supreme Court of Virginia, at Wytheville, Virginia.)

CLAIM OF JEAN McNEIL PEPPER FOR $9,000, INTEREST AND COSTS.

(11) (Filed November 8, 1934)

At Bristol, Virginia, on the 7th day of November, 1934, came Jean McNeil Pepper, administratrix and sole devisee of A. P. Pepper, deceased, and made oath and says that Dixie Splint Coal Company, Incorporated, the corporation by whom a petition for adjudication of bankruptcy has been filed, was justly and truly indebted to said deponent in the sum of $9,000.00 with 6% interest on $3,000.00, part thereof, from July 1, 1929, on $3,000.00, part thereof from July 1, 1930, and on $3,000.00, the remainder thereof from July 1, 1931 until paid, including the costs of said proceeding; that more than four months prior to the adjudication of said bankrupt, to-wit: February 19, 1934, said deponent obtained a judgment against said bankrupt for the amount aforesaid, a copy of said judgment being filed herewith as a part hereof and marked Exhibit "A"; that no part of said judgment or debt has been paid; that there are no set-offs or counterclaims to the same; that said deponent has not, nor has any person by her order, or to her knowledge or belief, for her use, had or received any manner of security for said debt whatever, except such lien as deponent is entitled to upon the real property of the bankrupt, by the docketing of her said judgment on May 7, 1934 at 2:00 P. M.; and, that she claims no lien by virtue of her said judgment upon any of the funds of the said bankrupt's estate.

(Signed) JEAN McNEIL PEPPER,
Executrix & Sole Devisee of A. P. Pepper, deceased.

Subscribed and sworn to before me this 7th day of November, 1934.

(Signed) MARTHA C. SMITH,
Notary Public.

My commission expires on the 9th day of August, 1936.

(Seal)

(See Virginia Record page 67 for judgment, Exhibit A.)

LITTON EXCEPTIONS TO PEPPER CLAIM.

(Filed December 14, 1934).

Scott Litton, a creditor of Dixie Splint Coal Company, (12) Incorporated, by his counsel, comes and excepts to the claim filed by Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, on the 8th day of November, 1934, in the principal sum of $9000.00, and objects to the allowance of said claim against the bankrupt's estate and for grounds of exception, says:

That it is not yet finally established that the Dixie Splint Coal Company, Incorporated, is indebted to Jean McNeil Pepper, Executrix, in the amount claimed or in any amount in that the decree upon which the said claim is based, a copy of which is filed as an exhibit therewith, is now under review in the Supreme Court of Appeals of Virginia subject to the judgment of that court, and that the question of whether or not the bankrupt is indebted to this claimant in any amount is pending and undetermined in the Supreme Court of Appeals of Virginia.

Respectfully submitted this 12th day of December, 1934.

(Signed) M. M. LONG,
St. Paul, Virginia
(Signed) I. M. QUILLEN,
Lebanon, Virginia.
Counsel for Scott Litton.

LITTON AMENDED, CONDITIONAL, EXCEPTIONS TO PEPPER CLAIM.

(Filed August 23, 1937)

In view of the opinion and order of April 21, 1937, of the District Judge herein, and of the order of the Circuit Court of Appeals of June 16, 1937, herein, and of the

statements of the Circuit Court of Appeals at the hearing prior to said order of April 16, 1937, at which hearing the Court indicated a desire that all questions in this case be raised and passed upon below before any hearing in the Circuit Court of Appeals, Scott Litton, a creditor of Dixie Splint Coal Company, Incorporated, by his counsel, comes and tenders, conditionally, this amendment to his exceptions to the claim of Jean McNeil Pepper, which claim was filed herein on November 8, 1934, and which exceptions were filed herein on December 14, 1934, and states:

One of the questions before the Court in this case is whether or not the Federal Court can now inquire into the validity of the Judgment of June 2, 1933, of Scott (13) Litton against Dixie Splint Coal Company for $33,468.89, interest and costs, and of the executions issued thereon, which question was heretofore submitted by the Bankruptcy Court, upon petition of Jean McNeil Pepper, to and decided by the State Courts, which Courts decided adversely to her.

While relying upon the defenses of *res judicata* and estoppel against Jean McNeil Pepper and the Trustee in Bankruptcy as to the validity of said judgment and the executions thereon, and without waiving said defenses, Scott Litton is advised if it should be held in this cause that the validity of said judgment of Scott Litton against Dixie Splint Coal Company can be again inquired into and determined herein, for any reason or upon any ground, then, in that event, he would have the right to ask the Court to again inquire into and determine the correctness and validity of the judgment of the Corporation Court of the City of Bristol, Virginia, in favor of Jean McNeil Pepper, Executrix, etc., against Dixie Splint Coal Company, for $9,000 and interest and costs, rendered February 19, 1934, a copy of which is filed with the proof of debt of Jean McNeil Pepper herein for $9,000, interest and costs, because:

The suit in the Corporation Court of the City of Bristol, Virginia in which said judgment was rendered was based upon the alleged failure of Dixie Splint Coal Company to pay all the minimum royalties contracted to

be paid under said lease prior to the final and complete breach of the mining lease contract by the abandonment of the leased premises, and for damages for all the breaches of said contract at the date of the abandonment thereof, February 1, 1928.

It was error apparent upon the face of the record for the Corporation Court of the City of Bristol, Virginia, to render said judgment for minimum royalties accruing after the breach of contract alleged in the pleadings in said cause, the pleadings fixed the time of the breach of the contract sued on as of February 1, 1928, and prayed that the damages be ascertained as of that date, and that interest be allowed on the amount of damages ascertained from that date, hence it was error for the Court to give judgment for minimum royalties accruing after the date of the entire breach of the contract sued on, which error appears from the following quotations from the pleadings filed by said Jean McNeil Pepper, viz:

Amended and supplemental bill, filed February 8, 1932, (Page 78 of the Printed Record in the Supreme Court of Appeals of Virginia in the case of Jean McNeil Pepper (14) vs. Dixie Splint Coal Company, et al., June Term, 1935, at page 83-84, a copy of which printed record is filed as a part hereof):

"TENTH: Complainant alleges that the Answer of the Defendant shows:

'That on January 1st, 1924, a new corporation was organized bearing the same name as the first Dixie Splint Coal Company, Incorporated, but by different stock holders from the first corporation, and said last named corporation, while it did not take over and assume said lease of October 21, 1919, and made no new agreement with the Lessor in said lease, it did continue to mine coal from the coal acreage covered by said lease of October 21, 1919, *up to and including a part of the year 1928, when all mining on said property ceased and it abandoned said premises.* (Defendant's Answer, page 12).

'In view of which Complainant charges and alleges that "The First Dixie Splint Coal Company", a corpora-

tion, "The Second Dixie Splint Coal Company", a co-partnership, and the individual co-partners composing said co-partnership, and "The Third Dixie Splint Coal Company", a corporation, became and are jointly and severally liable to this Complainant for the value of eighty five (85%) per centum of all of the unmined recoverable coal upon the leased premises *at the time of said abandonment*, by virtue of the following provisions, contained in said Lease Agreement, namely:'

' . . . said Lessee, for itself, its successors and assigns, covenants diligently to mine and remove all of said coal in a good lawful, workmanlike manner in compliance with this lease and in accordance with the laws of the State of Virginia and of the United States now in force or that may be hereafter enacted, to the end that there shall be recovered from said stratum the greatest possible tonnage of coal; and the quantity of coal to be recovered from said boundary, as now agreed upon be-
(15) tween the parties hereto shall be not less than eighty five (85%) per cent of the entire body of the said coal stratum in said boundary.'

(Last part of provision 2 of Lease.)

'Complainant alleges that eighty five (85%) of the recoverable coal in the Jawbone, or No. 5 seam, *at the time of the abandonment of said lease*, was approximately one million (1,000,000) tons; and that the agreed royalty rate to be paid for each and every gross ton of said coal was, as provided in said Lease Agreement, 15¢ per ton. Complainant further alleges that "The First Dixie Splint Coal Company," and "The Second Dixie Splint Coal Company", and each individual composing said co-partnership, and "The Third Dixie Splint Coal Company", are jointly and severally liable to Complainant for a sum of money amounting in the aggregate to $150,000, in addition to the minimum royalty and other payments due Complainant, and fully set out in his original bill.' "

Said cause was appealed by Jean McNeil Pepper to the Supreme Court of Appeals of Virginia for the purpose of holding the individual defendants liable for the damages

alleged, and in an opinion and order rendered September 19, 1935 (Pepper v. Dixie Splint Coal Company, 181 S. E. 406) the Supreme Court of Appeals held the individual defendants liable, and remanded the cause with the direction "that an accounting be had in accordance with the prayer of the Amended and Supplemental Bill (above quoted), and that any damages shown to have been sustained by the appellant, or her decedent, A. P. Pepper, by reason of the failure of the defendants to mine the premises in accordance with the terms of the lease, be ascertained and fixed, and for this purpose, if deemed advisable, the Court should impanel a Jury."

Following said mandate, under date of November 26, 1935, said Jean McNeil Pepper filed a petition in said cause, in which she restated, in condensed form, and itemized her claim for damages, and in which she fixed the date of the breach of said lease contract as at February 1, 1928. A printed copy of the record in the Supreme Court of Appeals of Virginia, in the case of Jean
(16) McNeil Pepper vs. Floyd H. Roberts, Judge, June Term, 1936, which contains a copy of said petition, is filed herewith, and sections V and VI thereof are as follows:

V.

"Petitioner further shows that this Court, in its opinion in this case (R. 474) said:

'Another defense relied upon is that defendant corporation has exhausted the merchantable coal covered by the lease. The preponderance of the evidence is to the contrary and creditable witnesses place the amount still there as exceeding five hundred thousand tons.'

"The Supreme Court of Appeals affirmed the finding of this Court, and in its decision in this case said:

'The defendants claim that they have exhausted the merchantable coal on the premises, but the trial court held adversely to this claim, saying that "The preponderance of the evidence is to the contrary and creditable witnesses place the amount still there as exceeding five hundred thousand tons". We are in accord with this finding of the trial court." (Decision p. 17).

"The Petitioner shows that she is willing to accept five hundred thousand (500,000) tons of unmined merchantable coal now remaining upon the leasehold, as the quantity of coal which the defendants abandoned, and, which they were obligated to mine under the terms of said Lease Agreement.

"Petitioner shows that the measure of damages to which she is entitled for said quantity of unmined coal is fixed by the Lease Agreement at fifteen (15 cts.) per ton.

"Petitioner further shows that according to the Answer and Cross-Bill of Scott Litton (R. 73) that defendants:

'Did continue to mine coal from the said coal acreage covered by said lease of October 21, 1919, up to and including a part of the year 1928, when all mining on said property ceased and it abandoned said premises.

"Petitioner shows, therefore, that in addition to the liquidated damages of fifteen (15 cts.) cents per ton for five hundred thousand (500,000) tons of unmined merchantable coal remaining upon the leasehold premises, (17) she is entitled to interest on the total amount from 1928, until paid; and, Petitioner here states that she is willing that interest on said sum be computed from February 1, 1928 until paid.

VI.

"Petitioner further shows that the defendants are liable under the said decision of the Supreme Court of Appeals for the performance of all the covenants contained in the Lease Agreement of October 21, 1919, and damages for the breach thereof; and, that under Section 3 of said Lease Agreement (R. p. 39) the Lessees agreed and covenanted to pay the Lessor annually:

'At least three thousand ($3,000.00) Dollars, payable in twelve (12) monthly instalments of Two Hundred and Fifty ($250.00) Dollars per month, even though the royalty on the tonnage of coal actually mined in any year is less than the amount aforesaid,' etc.

"Petitioner states that she is willing to have the annual royalties due her computed and ascertained as of the 31st day of December in each year; and, Petitioner shows that she is entitled to judgment against the Defendants according to Exhibit A filed by Scott Litton (R. 420) for the year 1920, to and including the year 1927, for the difference between the total amount of monthly per ton royalties paid to her in each such year, and, the sum of Three Thousand ($3,000.00) Dollars, with interest thereon, from the end of each said year, until paid.

"In view of the premises, Petitioner prays that she be decreed judgments, individually, and collectively, against Scott Litton, Pauline Jones Litton, C. P. Jones, Ida L. Farris, Lee Long, Lucy G. Long, Charlotte L. Stewart and Mildred L. Wolfe, for the following sums of money, namely:

500,000 tons of unmined coal @ 15 cts. per ton	$75,000.00
Interest from February 1, 1928 (R. 420) to November 1, 1935; namely 8 years and 9 months	39,375.00
	$114,375.00

"For Annual Minimum Royalty, Balance due as follows:

Year	Royalty	Am. Paid	Bal. Due	Int. to Nov. 1, 1935	Total Due Nov. 1, 1935
1920	$3,000.00	$2,665.50	$ 334.50	$ 301.38	$ 635.88
1921	$3,000.00	127.56	2,872.44	2,675.06	5,547.50
1922	3,000.00	pd. in full	-0-	-0-	-0-
1923	3,000.00	pd. in full	-0-	-0-	-0-
1924	3,000.00	2,527.89	472.11	335.23	807.34
1925	3,000.00	1,974.00	1,026.00	666.90	1,692.90
1926	3,000.00	pd. in full	-0-	-0-	-0-
1927	3,000.00	1,876.92	1,123.09	595.19	1,718.27
					$10,401.89

(18) Total Amount Due Nov. 1, 1935 125,151.89"

From which pleadings of Jean McNeil Pepper, both before and after the rendition of said judgment for $9,000.00, it appears that said Jean McNeil Pepper fixed the complete and final breach of the lease contract and the abandonment of the premises as of February 1, 1928. Hence she could not recover for separate items of damages after said final breach and abandonment of the leased premises, and it was error apparent on the face of the record for the Corporation Court to render said judgment for $9,000.00 for minimum royalties accruing after the date of said breach, at which date all items for damages were merged in the claim and suit for damages. Hence there was no debt due or owing said Jean McNeil Pepper, Executrix, etc., for the sum of $9,000.00 upon which said judgment was based, and she is not a creditor of the Dixie Splint Coal Company.

Wherefore, said Scott Litton tenders this amendment to his exceptions to said claim of Jean McNeil Pepper, as a common claim or debt, conditionally, in the event it should be held in this cause that the question of the validity of his judgment against Dixie Splint Coal Company can be again inquired into and examined, and in such event will ask that the judgment of the Corporation Court of Bristol in favor of Jean McNeil Pepper against Dixie Splint Coal Company, for $9,000.00, interest and costs be also inquired into, and upon a hearing that it be held improper and incorrect, because of error apparent on the face of the record in said cause, and that said claim of Jean McNeil Pepper, upon said hearing, be disallowed as a common claim.

Respectfully submitted, August , 1937.

SCOTT LITTON,
By Counsel.

(Signed) HENRY ROBERTS, Bristol, Virginia
(Signed) M. M. LONG, St. Paul, Virginia
(Signed) I. M. QUILLEN, Lebanon, Virginia.

(19) (Memorandum of Counsel):

It is stipulated that the Tenth Clause of the amended and supplemental bill in the case of Pepper v. Dixie Splint Coal Company, et al, filed February 8, 1932, is correctly quoted in the foregoing amendment.

MINUTES CREDITORS MEETING NOVEMBER 8, 1934.

(20) (Filed November 9, 1934)

At Norton, Virginia, on the 8th day of November, 1934, before John Roberts, Referee in Bankruptcy..

At a hearing this day held pursuant to the notice of the referee given on the 3rd day of November, 1934, to the parties mentioned in the notice, said notice having been given after the filing of the petition of Scott Litton on the 3rd day of November, 1934, asking the referee to rehear a petition heretofore filed by Jean McNeil Pepper, and to review an order entered by the Referee on the 17th day of October, 1934, directing P. H. Smith, Trustee, to intervene in a certain suit pending in the Circuit Court of Russell County, Virginia, the object of the same being to quash an execution issued by the clerk of the Circuit Court of Russell County on the judgment of Scott Litton against Dixie Splint Coal Company, Inc. Present: P. H. Smith, Trustee, I. M. Quillen and S. B. Quillen, counsel for Scott Litton; Joe L. Cantwell and H. G. Morison, Jr., of counsel for Jean McNeil Pepper.

Messrs. Cantwell and Morison filed proof of claim of Jean McNeil Pepper in the sum of $9,000.00 as a general claim and it is noted that the proof of claim has incorporated therein this statement, "except such lien as deponent is entitled to upon the real property of the bankrupt by the docketing of her said judgment on May 7, 1934, at 2:00 P. M.

The Referee called attention to the fact that the three general creditors whose claims were filed at the first meeting of creditors had been withdrawn by these claimants within the last two or three days, they being set forth in the minutes of the first meeting of creditors.

The Referee called attention to the order entered on September 26, 1934, directing the trustee to intervene in the interpleader proceeding in the Circuit Court of Russell County, Virginia, under the style of M. C. Chaffin, Deputy Sheriff v. Scott Litton et als and that at the.

time the said order was entered the referee had no intimation or knowledge that there would be any claim in the matter that the judgment obtained against the bankrupt by Scott Litton was either void or voidable, and that it now appears to the referee that perhaps the entering of this order was ill advised, as the trustee by intervening in the case and asking that the funds in the hands of the clerk of the circuit court of Russell County (21) be paid to him might work an estoppel on him with reference to taking any proceedings toward nullifying the judgment of Scott Litton against Dixie Splint Coal Company, Inc., and that perhaps an order should be entered now either nullifying the order above mentioned of September 26 or directing any proceeding by the trustee thereunder to be held in abeyance until the trustee may be advised by disinterested counsel as to whether or not he should take any proceeding toward having the judgment of Scott Litton declared null and void.

Statement by Mr. I. M. Quillen:

As the referee will recall the trustee by order or orders entered by the referee very shortly after the first meeting of creditors was directed to intervene not only in the interpleader proceeding above mentioned by the referee but also in a certain action pending in the Corporation Court of the City of Bristol wherein Jean McNeil Pepper was plaintiff and Dixie Splint Coal Company and Dominion National Bank were defendants which was a garnishment proceeding wherein certain funds of the Dixie Splint Coal Company were held, and also in a certain suit in chancery pending in the United States District Court for the Eastern District of Virginia under the style of Central Hanover Bank & Trust Company et al v. Norfolk Southern Railway Company, et al, wherein other funds of the bankrupt were held for the purpose of having these funds paid into the hands of the trustee. As counsel acting for the trustee in those three matters I desire to state that orders have been entered in all three of those cases directing the respective funds to be paid to the trustee. The fund in the Circuit Court of Russell County, Virginia, has been paid and I am advised that the trustee now has the check. The fund in the suit in the United States District Court for the Eastern District

of Virginia has been paid and counsel for the trustee now has the check which he will deliver to the trustee today. Check has not been received for the fund held in the Corporation Court of the City of Bristol, but as above stated the order has been entered. Since under the circumstances there are no further services which I could perform for the trustee I wish at this time to tender my resignation as counsel for the trustee.

As counsel for Scott Litton in this proceeding I wish to make the following statement:

At the first meeting of creditors there was no appear-(22) ance upon behalf of the creditor Jean McNeil Pepper. At that time counsel for the bankrupt stated to the referee that there was a chancery suit pending in the circuit court of Russell County, Virginia, in which Jean McNeil Pepper was plaintiff and Scott Litton was defendant, the purpose of which was to have declared null and void the judgment of Scott Litton. At that meeting or shortly thereafter orders were entered directing the trustee to intervene in the three above named proceedings. The bill in the chancery suit above referred to was filed on June 13, 1934, and between that time and the first meeting of creditors no action in said suit had been had or sought by the plaintiff. Some time after the first meeting of creditors and the entering of the above named orders Jean McNeil Pepper instituted in the Circuit Court of Russell County a motion to quash the judgment of Scott Litton which motion was dismissed on the plea of jurisdiction. At that time Jean McNeil Pepper had never filed any proof of claim in bankruptcy and has never filed any proof of claim in bankruptcy until this date although she has had full notice and knowledge of the bankruptcy proceedings since their inception. The personal property of Dixie Splint Coal Company was sold by the sheriff of Russell County, Virginia, to satisfy the execution of Scott Litton prior to the adjudication in bankruptcy pursuant to a levy made upon said execution. The sheriff paid this money into court and filed an interpleader proceeding against Scott Litton, Jean McNeil Pepper and Clinchfield Coal Corporation, which also claimed a lien against the property. By her answer filed in the said interpleader proceeding on the 13th day of July, 1934, Jean McNeil Pepper acquiesced in the pay-

ment of the lien of Clinchfield Coal Corporation out of the funds realized from said sale, and her counsel acting in the capacity of counsel for Clinchfield Coal Corporation signed and filed in the cause a receipt for that portion of the fund, thereby necessarily affirming the validity of the execution and sale made thereunder. Counsel for Scott Litton asserts that Jean McNeil Pepper is estopped to contest the validity of the judgment or execution of Scott Litton by reason of her acts and conduct in relation thereto. And Counsel for Scott Litton further affirms that there is no other creditor of the bankrupt's estate (23) that desires or asks that the judgment be attacked. Attention is further called to the fact that by her bill in chancery filed in the Circuit Court of Russell County, Virginia, prior to the sale she did not ask the court to restrain the said sale but abandoned that remedy and did not ask the court for an injunction and permitted the sale to be made although she had a case pending at the time for that purpose.

Counsel for Scott Litton contends that it is not right and proper to permit this creditor to utterly ignore the bankruptcy proceedings and allow orders to be entered therein which might be detrimental to their rights without objection and proceed in an independent suit, after adjudication in bankruptcy, quash the execution and wait until this late date to file her proof of claim in which she still claims to be at least partially a lien creditor, and especially after she had judicially recognized the validity of the judgment, and at this time request the referee to set aside former orders and without objection on her part and intervene in and prosecute suits in which she is clearly estopped, she being the only creditor to desire such procedure. Attention is further called to the fact that the order recently entered in the circuit court of Russell County, directing payment to the trustee of the fund there, was agreed to by Jean McNeil Pepper by order signed by her counsel.

We submit that it would not be proper in any view for the trustee to intervene in the motion to quash the execution of Scott Litton for the reason that it was brought by this creditor long after the adjudication in bankruptcy by creditor who had no standing. The action had no vitality then and the intervening of the trustee

at this time could give it no vitality. It is further submitted that there should be no intervention in that proceeding for the reason that the same relief is asked for in the chancery suit which is now pending and upon the same ground, and it would be useless expense and legally improper to try the same question in two different suits or actions.

Statement by Mr. Cantwell:

Counsel for Jean McNeil Pepper at this time wishes to read into the record her answer in the interpleader proceeding of M. C. Chaffin, the original answer having been (24) brought from the court record of Russell County, Virginia, by Mr. Quillen here this morning. (See Certified copy attached.)

We desire further to call the court's attention to the original notice of list pendent in the cause of Jean McNeil Pepper etc. v. Dixie Splint Coal Company, Inc., et al in the Circuit Court of Russell County, Virginia, which notice was filed June 14, 1934, at 8:00 A. M., which was prior to the sale made by M. C. Chaffin above referred to. We also wish to take exception to Mr. Quillen's statement that the motion by Jean McNeil Pepper in the Circuit Court of Russell County, Virginia, to quash the execution on the judgment confessed by Dixie Splint Coal Company, Inc., in favor of Scott Litton has not been dismissed by order of the court on jurisdictional grounds. No action was taken by the court as we understand it and the motion is still pending. We desire to broaden the motion of Jean McNeil Pepper in the bankruptcy proceeding by having it include a direction by the referee to the trustee to move in the Circuit Court of Russell County, Virginia, to quash any and all executions issued by said court on a judgment confessed by Dixie Splint Coal Company, Inc., in favor of Scott Litton on the ground that said confession of judgment is void.

Statement of Mr. Quillen:

I also want copied into the record the petition of the sheriff in the interpleader proceeding, Mrs. Pepper's answer thereto, the order of the court directing payment

of the fund to the Clinchfield Coal Corporation, the letter of Mr. Morrison which I just now read and the last order entered in the case.

(Clerk's Memorandum: Order of Circuit Court of Russell County, Virginia, a part of the minutes, omitted by direction of counsel for both parties, with the following note)

(See Virginia Record page 87 for interpleader petition, page 90 for Pepper answer, and page 101 for order of November 1, 1934.)

The Referee also called attention the fact that Mrs. Pepper's address is not given in the schedules and that he mailed the original notice of the first meeting of creditors to Mrs. Pepper at Lebanon, Virginia, on September 10, and that he mailed the notice continuing the first meeting of creditors for a few days on September 19, and each of these notices were later returned to the Referee and they are now filed with the papers in this case. The (25) referee was informed by someone that Messrs. Warren & Cantwell, represented Mrs. Pepper and the referee's recollection is that the copy of the notice adjourning the first meeting was mailed to Messrs. Warren & Cantwell, but the Referee does not make this as a positive statement. The referee called attention to the fact that any creditor has six months within which to file their proof of claim after the adjudication.

It is ordered that P. H. Smith, Trustee, return the check to E. F. Hargis, Clerk of the Circuit Court of Russell County that has been delivered to him by order of the circuit court of Russell County in the interpleader proceeding pending in said court and that the trustee hold in abeyance any further action under the order entered on September 26, 1934, until the further order of the referee.

It appearing that Mr. I. M. Quillen has resigned as Counsel for the trustee in this matter and that the trustee needs counsel to advise him with reference to what, if any, proceeding should be taken with reference to the

judgment of Scott Litton obtained in the Circuit Court of Russell County, Virginia, against the Dixie Splint Coal Company, it is ordered that the selection of M. M. Heuser and his partner, C. W. Hamilton, as attorneys for the trustee be, and the same are hereby approved by the referee. It is further ordered that the said counsel give the matters involved in this case their prompt attention and that they file such petition on behalf of the trustee as they may deem advisable with reference to itemizing in any matter that appears to be in controversy in this case.

The referee having heretofore called attention to the fact that the claims of Superior Sterling Company, Appalachian Electric Power Company and Commercial Acetylene Supply Co., Inc., have all requested to withdraw their general claims filed in this matter, and that the referee has returned the proofs of these respective claims to the said respective parties, it is ordered that said claims be and they are hereby expunged from the record in this matter.

No further matters coming before this meeting the same is adjourned.

(Signed) JOHN ROBERTS,
Referee in Bankruptcy.

PETITION OF HEUSER AND HAMILTON TO FILE
(26) INDEPENDENT PROCEEDING

(Filed November 27, 1934)

The undersigned, who were approved as counsel for the Trustee by an order entered herein on November 8, 1934, report herewith that they have considered the questions involved in the litigation now pending in the Circuit Court of Russell County, Virginia, attacking the validity of a certain judgment confessed by the bankrupt corporation in favor of Scott Litton, before the Clerk of said Court, dated June 2, 1933, for the sum of $33,468.89 with interest from June 2, 1933, and costs $12.50; that it appears that said judgment and execu-

tions issued thereon and a sale made thereunder involve the title to virtually all of the personal estate of the bankrupt as well as the real estate; that it appears that said judgment is probably void and that it would, therefore, be to the interest of the bankrupt's estate to have same abated and set aside and all executions thereon quashed.

Wherefore, the undersigned ask for permission to institute a new and independent proceeding in the Circuit Court of Russell County, Virginia, for the purposes above stated, and that all necessary disbursements for court costs, etc., be made.

This the 26th day of November, 1934.

(Signed) M. M. HEUSER,
(Signed) C. W. HAMILTON,
Attorneys for P. H. Smith, Trustee of the Estate of Dixie Splint Coal Company, Inc., bankrupt.

OBJECTIONS OF SCOTT LITTON TO SAID PETITION.

(Filed December 8, 1934)

The undersigned counsel for Scott Litton, a creditor of the estate, have been furnished a copy of the petition of M. M. Heuser and C. W. Hamilton, Attorneys for P. H. Smith, Trustee, filed with the Referee on the 26th day of November, 1934, wherein the said Attorneys for the Trustee seek permission to institute a "new and independent" proceeding in the Circuit Court of Russell County, Virginia, to set aside the judgment asserted in this proceeding by Scott Litton.

In answer to the aforementioned petition, counsel for (27) Scott Litton say that such permission should not be granted and that such a proceeding would be improper and unnecessary under the circumstances now prevailing in this matter.

It is an admitted fact that no creditor of the estate save and except Jean McNeil Pepper, Executrix, desires or asks that Scott Litton's lien be attacked. It is like-

wise an uncontroverted fact shown by a petition of Jean McNeil Pepper, Executrix, heretofore filed in this cause that there is now pending in the Circuit Court of Russell County, Virginia, to proceedings instituted by Jean McNeil Pepper, a creditor of the estate, both of which proceedings having as their purpose the setting aside and annulling of the aforementioned lien of Scott Litton; one a chancery suit and the other a motion to quash all executions issued on Litton's judgment. In both of these proceedings the issues are made up and the cases are ready for the hearing of testimony. Both of these proceedings have been pending for a considerable time, the chancery suit some four or five months and the motion to quash more than two months and the litigants therein have already incurred a great deal of trouble, cost and other expense.

Under Section 67B of the Bankruptcy Act the Trustee in Bankruptcy is subrogated to the rights of the creditor, Jean McNeil Pepper, who is the plaintiff in the two above named proceedings, and may intervene in said proceedings and establish such rights as the creditor may have and it appears to counsel for Scott Litton that it is the clear intendment of the bankruptcy law that where such a situation prevails the above mentioned method of procedure should be followed since that particular portion of the law was obviously enacted to cover just such a case as prevails here. This is especially true since the creditor, who is plaintiff in the proceedings pending, is the only creditor of the estate who asks either in bankruptcy or elsewhere that Litton's judgment be attacked and is the only creditor who can profit by the successful prosecution of these proceedings. Jean McNeil Pepper has chosen her ground for this contest and issue is joined and no reason appears or can appear why these proceedings should be abandoned and the same relief sought in still a third proceeding to be brought in the identical same court where the other two are now pending.

Scott Litton feels that from two standpoints he has the right and should object to the institution of the
(28) third suit; first, because the institution of an unnecessary suit would uselessly dissipate the funds of the estate of which he is a creditor, and secondly, because

such proceeding would be an imposition and an injustice upon him as the defendant in such a suit. As above stated, he has already been compelled to defend two suits brought for the same purpose where one would have sufficed and has incurred a great deal of expense already in the defense of the pending suits and if a third suit were instituted, he would be called upon to expend still further time and money in the defense of it. It is a universally accepted principle of law, that a man can not be harassed by a multitude of suits touching the same subject matter.

Counsel for Scott Litton further say that there should be no proceeding at this time to test the validity of Litton's judgment for the reason that the suit in which said judgment of Jean McNeil Pepper was rendered is pending and undetermined in the Supreme Court of Appeals of Virginia wherein Jean McNeil Pepper is appellant and Scott Litton and Dixie Splint Coal Company are appellees and in which said suit in the Court of Appeals counsel for Dixie Splint Coal Company has or will assign cross error contesting said judgment of Jean McNeil Pepper.

Counsel for Scott Litton, of course, recognizes the fact that the matter of intervention on the part of the Trustee lies in the discretion of the Referee, but counsel have already heretofore taken the position that Scott Litton's lien is a valid one and that on account of certain waivers of rights and estoppel, of which, evidence has been presented to the Referee, Litton's lien can not be successfully challenged in any sort of proceeding and that, therefore, in the exercise of the Referee's discretion the Referee should declare Scott Litton's lien valid and allow it as a preferred claim. Counsel for Scott Litton do not abandon their contention but continue to rely thereon.

Respectfully submitted,

(Signed) M. M. LONG, St. Paul, Va.
(Signed) I. M. QUILLEN, Lebanon, Va.
Counsel for Scott Litton.

REFEREE'S ORDER REQUIRING PEPPER TO EXECUTE BOND.

(29) (Filed March 23, 1935)

At Norton, Virginia, on the 23rd day of March, 1935, before John Roberts, Referee in Bankruptcy.

It appearing that Messrs. Hamilton & Heuser, attorneys for P. H. Smith, Trustee, have heretofore on the 11th day of March, 1935, filed a petition before the undersigned referee asking for permission of the Referee to take the necessary steps to seek a writ of error in the case pending before the Circuit Court of Russell County, Virginia, wherein P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Inc., Bankrupt, is plaintiff and Scott Litton is defendant, due notice having been given of the filing of said petition to the Trustee, Scott Litton and Mrs. Jean McNeil Pepper for hearing to be had on said petition on this date, and at said hearing there were present the following: Messrs. Hamilton & Heuser, attorneys for the Trustee, Messrs. I. M. Quillen, S. B. Quillen and M. M. Long, counsel for Scott Litton and Messrs. J. L. Cantwell, Jr., and W. H. Woodward of counsel for Mrs. Jean McNeil Pepper.

The referee heard counsel for the various parties in re said petition. Counsel for Scott Litton opposed the entering of an order granting permission to apply for the writ of error and suggested that if such order is entered that Mrs. Jean McNeil Pepper should be required to give proper security for all cost that might be awarded against the trustee in and about said appeal, including cost of the record, attorney's fees from this date and all cost that may be finally awarded against the trustee. Counsel for Mrs. Pepper suggested that there is probably a fund in the hands of the Trustee on which Scott Litton does not have a lien and that permission should be given to take the appeal without the requirement of bond, and it appearing to the Referee that as the above case now stands Scott Litton under the order of the Circuit Court of Russell County, Virginia, has a valid lien on practically all funds in the hands of the trustee and that to litigate the matter further would be practi-

cally entirely at his expense, and the Referee is of the opinion that Mrs. Pepper should give security for all cost as above indicated as a condition to the Trustee and his counsel being permitted to ask for the writ of error (30) and carry the above case to the Supreme Court of Appeals of Virginia it is therefore ordered that if Mrs. Jean McNeil Pepper shall file a bond condition as aforesaid in the sum of $1,000.00 with corporate security of some company licensed to do business in Virginia with the undersigned Referee within fifteen days from this date, the Trustee and his counsel shall proceed with the application for the writ of error requested. It is further ordered that if the said bond is not filed within fifteen days from this date the petition is dismissed.

It is directed that a copy of this order be furnished by the Referee to Messrs. Hamilton & Heuser, I. M. Quillen and J. L. Cantwell, Jr.

(Signed) JOHN ROBERTS,
Referee in Bankruptcy.

IT IS STIPULATED that the bond required by above order, in the sum of $1,000.00, was executed under date of March 30, 1935, by Jean McNeil Pepper with United States Fidelity and Guaranty Company, as surety, and filed April 1, 1935, and that the Referee entered an order approving the bond April 1, 1935.

PETITION OF PEPPER TO REVIEW ORDER REQUIRING BOND.

(31) (Filed April 2, 1935)

(Clerk's Memorandum: Clauses 1 to 5, inclusive, of the petition omitted by direction of counsel).

Clauses 1 to 5 recite history of proceedings requiring Jean McNeil Pepper to execute the bond for $1,000, and concludes with clause 6, viz:

6. That Jean McNeil Pepper in order to expedite said proceedings for a Writ of Error, has executed and filed said bond, but that the said order requiring the ex-

ecution of the said bond was erroneous for the following reasons:

It requires one creditor of the bankrupt to bear all of the expense of a meritorious action for the benefit of any and all general creditors of the bankrupt who have, or may in the future, file claims.

It requires the creditor, Jean McNeil Pepper, to indemnify the creditor, Scott Litton, in the event the Trustee is unsuccessful in the petition for, and prosecution of said Writ of Error, and does not require the said Litton to indemnify Jean McNeil Pepper in case the said litigation is successful.

That your Petitioner knows of no authority under the bankruptcy law under which the said order could be entered, and believes the same to be without legal precedent.

Wherefore, your Petitioner feeling aggrieved because of said order, prays that the said order be reviewed as provided in the bankruptcy law.

Dated the 1st day of April, 1935.

(Signed) JEAN McNEIL PEPPER,
Petitioner.

ORDER OF DISTRICT COURT OF APRIL 16, 1935, APPROVING ORDER REQUIRING BOND.

(32) (Filed April 17, 1935)

Whereas a petition for review of an order entered by the Referee in Bankruptcy on March 23, 1935, has been filed and duly considered by the Court, from which order it appears that the Referee made it a condition authorizing the Trustee in Bankruptcy to apply for a writ of error to the Supreme Court of Virginia in certain litigation recently pending in the Circuit Court of Scott County, in which said Trustee in Bankruptcy was plaintiff, that Mrs. Jean McNeil Pepper, a creditor, should

file a bond in the sum of $1,000.00, conditioned upon paying the costs of said appeal:

Now, therefore, upon consideration of said petition for review of said order of March 23, 1935, and on hearing the arguments of counsel thereon, it is

ORDERED

that the order heretofore entered by the Referee as aforesaid be, and the same is hereby, approved and affirmed.

The Deputy Clerk of this Court at Big Stone Gap will send an attested copy of this order to John Roberts, Esq., Referee in Bankruptcy, Norton, Virginia.

STIPULATION AS TO MINUTES CREDITORS MEETING APRIL 23, 1935.

At this meeting various claims were considered, and (33) the following is a statement of the matters deemed pertinent to this appeal:

Re. CLAIM OF P. H. SMITH $350.00: A witness in his own behalf, Smith testified: That is for wages for book-keeping and collecting, etc., for July and part of June, at the rate of $250.00 per month, and is not any part of it for services as Executive Officer. I received $5,000.00 per year for my services as Executive Officer, exclusive of my salary of $250.00 per month for book-keeping, making a total of $7,500.00 per year. If my claim is not a prior claim, I wish to withdraw it.

Re. CLAIM OF A. C. JONES $101.64: A. C. Jones stated they owe me $101.00 for labor. I assigned the part of that earned within 90 days of bankruptcy, $56.57, to Price Brothers, leaving $46.07. I withdraw the balance of it not assigned to Price Brothers.

Re. GRADY ASTROP $75.73: I claim $57.09 preferred as a labor claim, and this has been assigned to Price Brothers, leaving $18.64 as a general claim.

Astrop requested the Referee, after the meeting, to withdraw his general claim, and was allowed to do so.

Re. RUSSELL WILLIAMS: On evidence before Referee part of this preferred labor claim held assigned to Price Brothers, and balance of $13.65 allowed as general claim. Williams not present.

Re. JACK BREEDING: $17.00 preferred and assigned to Price Brothers, balance of $2.35 allowed as general claim. Breeding not present.

REFEREE'S ORDER OF JUNE 25, 1935.

(34) (Filed June 25, 1935)

(Clerk's Memorandum: The following is an excerpt from the Referee's order beginning at bottom of page 6 and extending to point indicated by counsel near bottom of page 7)

This order considers and approves the assignment of sundry labor claims, amounting to $1140.81, to Price Brothers as preferred liens, and concludes:

With reference to the claim of Scott Litton filed in the sum of $600.00 for wages the record in this case clearly shows that Scott Litton was president of the bankrupt and there is no provision in the Bankruptcy Act to allow a president of a company a preferred or prior claim for wages. This is governed by the same section as above referred to and prior claims for wages can not be allowed except for wages due to workmen, clerk's traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600.00 to each claimant." Mr. Litton's claim could not possibly fall within any of the above.

It is ordered that the above mentioned claim of Scott Litton asserted in the sum of $600.00 as a prior claim be, and the same is disallowed as a prior claim but it is allowed as a general claim in the sum of $600.00.

The Referee holds that the claim of P. H. Smith asserted in the sum of $350.00 for labor falls in the same class as that of Scott Litton. Mr. Smith testified that he received two salaries, one in the sum of $5,000.00 as an executive officer, he being secretary and treasurer of the company, and another of $250.00 as a book-keeper. Mr. Smith had charge of all of the records, etc., of the bankrupt company as an executive officer and under the Bankruptcy Act and the decisions clearly is not entitled to a prior claim as above indicated and as Mr. Smith has stated that he desires to withdraw the claim if it could not be allowed as a prior claim the following order is entered:

It is ordered that the claim of P. H. Smith, filed herein as a prior claim as a laborer be, and the same is disallowed as such and since the claimant has stated that the claim is asserted only as a prior claim, it is ordered that the said claim be, and it hereby is directed expunged from the record in this case.

REPORT OF HAMILTON & HEUSER ON VIRGINIA COURTS LITIGATION.

(35) (Filed November 23, 1936)

The undersigned, as attorney at law for P. H. Smith, Trustee in Bankruptcy of the estate of Dixie Splint Coal Company, Inc., would report unto the Court as follows:

Pursuant to an order entered by this Court on the 18th day of December, 1934, an independent and separate suit was brought in the Circuit Court of Russell County, Virginia, on behalf of P. H. Smith, Trustee, etc., the object of which was to declare as void a certain judgment of record in the Clerk's Office of the Circuit Court of Russell County, Virginia, in favor of Scott Litton v. Dixie Splint Coal Company, Inc., in the principal sum of $33,468.89, confessed by P. H. Smith, Secretary-Treasurer of the Dixie Splint Coal Company, Inc., and that said suit was regularly heard by the Circuit Court of Russell County, Virginia, and a judgment rendered in favor of said Scott Litton, and

That, pursuant to an order entered by this Court on the 23rd day of March, 1935, the undersigned sought a writ of error from the Supreme Court of Appeals of Virginia, which was granted by the said Court and the aforesaid case placed upon the docket of said Court for its June Term, 1935 at Wytheville, Virginia, and said case was submitted at that term, and

That by opinion of the Supreme Court of Appeals of Virginia at its November Term, 1936 in Richmond, Virginia, as delivered by Preston W. Campbell, Chief Justice of said Court, on November 12, 1936, the judgment of the Circuit Court of Russell County, Virginia, was affirmed (copy of opinion of said Court is hereto attached and made a part of this report.)

Therefore, we report unto your Court that the validity of the aforesaid judgment in favor of Scott Litton v. Dixie Splint Coal Company, Inc., in the principal sum of $33,468.89 has been established by said Scott Litton to have been regularly confessed in so far as this matter is concerned.

The undersigned would also report unto the Court, that during the trial of this case, it appeared from the evidence that there is now in the hands of E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia (36) the sum of $953.25, which amount is assets of the estate of Dixie Splint Coal Company, Inc. and an order should be entered directing the Clerk of said Court to pay this amount to P. H. Smith, Trustee.

This November 23, 1936.

HAMILTON & HEUSER,
Attorneys for P. H. Smith,
Trustee, etc.
By (Signed) C. W. HAMILTON.

(Counsel's Memorandum):

For Opinion filed with report see Smith v. Litton, 167 Va. 263, 188 S E 214.

REFEREE'S ORDER FEBRUARY 6, 1937, WITH EXCERPT FROM TRUSTEE'S REPORT.

(37) (Filed February 6, 1937)

At Norton, Virginia, on the 6th day of February, 1937, before John Roberts, Referee in Bankruptcy.

It appearing from the record in this case that there is pending in the Circuit Court of Russell County, Virginia, under the style of N. C. Chaffin, Deputy Sheriff, against Scott Litton, and others, a suit and that the Trustee in Bankruptcy has heretofore been directed to intervene in said suit and to ask the payment unto him of the sum of Nine Hundred Sixty-one Dollars and Seventy Cents ($961.70) paid into the hands of E. F. Hargess, Clerk of the Circuit Court of Russell County, Virginia, and it further appearing that all questions with reference to the matters involved in said suit and also in the suit of P. H. Smith, Trustee, against Scott Litton have been fully settled and determined and that the trustee in bankruptcy is entitled to the funds held by E. F. Hargess, Clerk, it is ordered that P. H. Smith, Trustee, collect from E. F. Hargess, Clerk, the net amount due from the funds that now remain in the hands of E. F. Hargess, Clerk.

It is directed that a copy of this order be mailed to P. H. Smith, Trustee, Clinchfield, Virginia; and, E. F. Hargess, Clerk, Lebanon, Virginia.

(Signed) JOHN ROBERTS,
Referee in Bankruptcy.

(Counsel's Memorandum):

IN A REPORT filed February 22, 1937, the Trustee that on February - - -, 1937, "Received from E. F. Hargis Clerk, residue of sale of the physical assets of the Dixie Splint Coal Company, $936.64."

PETITION OF JEAN McNEIL PEPPER TO GARNISHEE FUNDS.

(38) (Filed February 11, 1937)

Your petitioner, Jean McNeil Pepper, Executrix and sole devisee of A. P. Pepper, deceased, herewith respectfully shows that on September 19, 1935, the Supreme Court of Appeals of Virginia rendered a judgment in her favor and against Scott Litton and others for $496.97, and that said judgment is docketed in the Clerk's Office of the Corporation Court of the City of Bristol, Virginia, in Judgment Lien Docket No. 5, page 124; and that on August 8, 1936, the Corporation Court of the City of Bristol, Virginia, rendered a judgment in favor of your petitioner and against Scott Litton and others for $4,282.94, with interest thereon from August 7, 1936, till paid, and $ ..... costs, and that said judgment is docketed in the Clerk's Office of said Court in Judgment Lien Docket No. 5, page 130; that said judgments are unsatisfied, unpaid and subject to no credits whatever; that your petitioner is unable to collect and enforce payment of said judgments; that as doth appear from the records and papers herein, the above named bankrupt is alleged to be indebted to aforesaid Scott Litton in a large amount, and said Scott Litton has filed a proof of debt upon said alleged claim; that if said claim is allowed for payment the said Scott Litton will in due course of time receive a dividend thereon; that the proceeds of such dividend payment will probably be placed beyond the reach of your petitioner and she will be unable to enforce collection of her aforesaid judgments, if only the ordinary process of law be used.

Wherefore, your petitioner prays that in the exercise of his judicial discretion in such matters your Honor will enter an order permitting the garnishment process of the Corporation Court of the City of Bristol, Virginia, upon the hereinabove mentioned judgments, to be executed upon P. H. Smith, trustee in bankruptcy, of the above named bankrupt, as a co-defendant to Scott Litton as principal defendant; and that said trustee in bankruptcy be directed to answer any such garnishee summons and truthfully state what sums of money, if any,

he has in his hands belonging to aforesaid Scott Litton; and that said trustee in bankruptcy be directed to obey (39) the further order of the Corporation Court of the City of Bristol, Virginia, respecting the payment over of any such sum of money.

This February 10th, A. D. 1937.

JEAN McNEIL PEPPER,
Exec., etc.
By Counsel.

(Signed) A. K. MORISON &
(Signed) M. M. HEUSER,
Bristol, Virginia.

Such action by Bankruptcy Court is authorized by precedent. See the case of U. S. F. & G. Co. v. Salmon, 81 F. (2d) 420, referred to by the Prentice-Hall publication "Bankruptcy Service" in note on p. 1772.

(Counsel's Note):

On February 22, 1938, the Referee entered an order dismissing said petition.

REFEREE'S ORDER OF FEBRUARY 22, 1937.

(40) (Filed February 22, 1937)

At Norton, Virginia, on the 22nd day of February, 1937, before John Roberts, Referee in Bankruptcy.

This being the day set for final meeting of creditors in this case, due notice of which has been heretofore given by mail to all parties now at interest in said matter as is shown by copy of the notice filed with the papers, at 10:00 o'clock, A. M., on the 11th day of February, 1937, the meeting was duly convened with the following present: P. H. Smith, Trustee, Scott Litton, a claimant, I. M. Quillen and M. M. Long, Attys., for Scott Litton, M. M. Heuser who has heretofore, together with C. W. Hamilton, represented P. H. Smith, Trustee, and

who now appears for Jean McNeil Pepper, and C. W. Hamilton, Atty., for the Trustee.

The Trustee filed his report showing that he has collected the total sum of $10,092.04 and that he has heretofore paid out on the orders of the referee, the sum of $3,160.50 and that he has a balance in his hands in the sum of $6,934.51.

There was no objection to this settlement of the trustee and the same is approved.

The petition of Messrs. Hamilton and Heuser, Attorneys, asking for attorneys fee in the sum of $625 and expenses in the sum of $26.00 for their services rendered the trustee in the suit instituted in the Circuit Court of Russell County, Virginia, against Scott Litton and which said suit was carried to the Supreme Court of Appeals. After due consideration of the petition, the Referee being of the opinion that a fee of $250 for the services rendered by said Attorneys to the Trustee in said suit before the appeal was taken should be a fair fee for their services, it is ordered that said amount be allowed to be paid out of the general funds in this case together with $16.00 expenses, and it further appearing that there is no exception or objection to that part of the petition asking for a fee of $275 and $10 expenses for services and expenses incurred in and about the appeal to the Supreme Court of Appeals of Virginia, it is ordered (41) that said sum be allowed for said purposes with the express understanding that the same is to be charged against the bond filed in this case by Jean McNeil Pepper.

The Referee coming on to determine the expenses, Attorneys fees, etc., incurred by the trustee in Bankruptcy in and about the suit of P. H. Smith, Trustee, against Scott Litton after bond was required and executed in this matter by Jean McNeil Pepper and The United States Fidelity and Guaranty Company as her surety filed herein on the 1st day of April, 1935, and after due consideration of said matter, the Referee determines that the following are proper items of cost and expense to be charged against said bond:

1.	To amount paid E. F. Hargess, Clerk, on May 29th, 1935	$ 23.06
2.	To amount paid J. M. Kelly, Clerk, on July 6th, 1935	194.22
3.	To amount paid Hamilton & Heuser for expenses in and about said appeal July 18th, 1935	7.00
4.	To amount paid Hamilton & Heuser for expenses printing brief, June 17th, 1935	21.00
5.	To amount paid Smith & Company, premium on Appeal Bond, August 19th, 1936	10.00
6.	To amount of execution for costs, etc., issued by E. F. Hargess, Clerk, November 25, 1936	52.50
7.	To amount paid Hamilton & Heuser for Marion Printing Co., Printing petition for rehearing, Jan. 14th, 1937	21.19
8.	To amount of attorneys fee allowed Hamilton & Heuser this date	275.00
9.	To amount of expenses allowed Hamilton & Heuser this date	10.00
	Total	$ 613.97

It is therefore ordered that P. H. Smith, Trustee in Bankruptcy, forthwith collect said sum of $613.97 from Jean McNeil Pepper and/or United States Fidelity and Guaranty Company, her surety on said bond.

After due hearing at said meeting as to item four set forth in the notice for said meeting that is to determine what of the funds in the hands of the trustee are subject to the lien asserted by Scott Litton under judgment obtained in the Circuit Court of Russell County, Virginia, and what funds are subject to the claims of General creditors and the proper proportion of cost of administration, etc., to be charged against each fund. The Referee has determined as follows:

That of funds that have been collected in this case, the lien of the judgment of Scott Litton properly at-

tached to $7,457.85 of said funds and that $2,634.19 were not subject to said lien in so far as the Referee is able to (42) determine, $1,972.75 of said amount having been collected from the Norfolk and Southern Railway Company after the lien of Scott Litton was filed against the funds in the hands of the Receiver of the said Railway Company and $661.44 having been collected from small accounts after the bankruptcy and there being no definite proof that the lien of the judgment of Scott Litton had attached to any of said funds.

The Referee further determines that the cost and claims in this proceeding to be charged against the general fund and against the bond executed by Jean McNeil Pepper and her surety as follows:

1.	One-fifth of the general expense account of P. H. Smith, Trustee in Bankruptcy	$ 22.41
2.	One-fifth of the fee and expenses allowed I. M. Quillen, Attorney	59.50
3.	One-fifth of the trustee's commissions	48.36
4.	Labor claims heretofore paid	881.32
5.	Price Brothers labor claims	1140.81
6.	Dixie Beavers labor claims	20.18
7.	John Roberts, Referee, Expenses, claims, and fees heretofore allowed	40.32
8.	Hamilton & Heuser, Attys., expenses	11.30
9.	Sarah P. Easterling, Stenographer	70.00
10.	E. F. Hargess, Clerk	30.56
11.	J. M. Kelly, Clerk	194.22
12.	John Roberts, Referee, Commission, expenses, etc.,	19.45
13.	Hamilton & Heuser, Attys., Expenses	7.00
14.	Wise Printing Co., expenses printing brief	21.00
15.	Smith & Company, Appeal bond	10.00
16.	Hamilton & Heuser, Attys., expenses printing petition for review	21.19
17.	S. B. Quillen, premium trustee's bond	20.00

18.	Revenue charged on checks	.46
19.	Unpaid check J. I. Sabiston	37.03
20.	Hamilton & Heuser, Attys., fees and expenses	551.00
21.	John Roberts, Referee, fees allowing five claims	1.25
22.	Scott Litton, cost recovered Supreme Court of Appeals	52.50
	Total	$3259.86

Expenses, etc., chargeable to the fund on which Scott Litton has a lien:

1.	Taxes	$ 50.33
2.	P. H. Smith, Trustee, 4/5 commissions	193.40
3.	I. M. Quillen, 4/5 Atty. fee and expenses	238.00
4.	P. H. Smith, Trustee, 4/5 general expense act.	89.64
	Total	$ 571.37

It is here noted that there will also be Referee's Commissions of 1% on the amount hereafter to be directed paid to Scott Litton and that $71.84 commissions have not as yet been paid to P. H. Smith, Trustee, and $551.00 has not been paid to Hamilton & Heuser and $52.00 Cost has not been paid to Scott Litton.

It appearing that the Referee will not be able to determine the exact amount going to respective parties (43) until the trustee collects the sum of $621.47 from Jean McNeil Pepper and/or her surety, the Referee holds in abeyance his order of distribution until the trustee files his report with reference to said collection.

(Signed) JOHN ROBERTS,
Referee in Bankruptcy.

PETITION OF JEAN McNEIL PEPPER FOR REVIEW.

(44) (Filed March 1, 1937)

(Clerk's Memorandum: The following is an excerpt from the petition specified by Counsel)

This petition recites the proceedings prior to the Referee's order of February 22, 1937, practically copies said order, and concludes thus:

Your Petitioner would show that the order of February 22, 1937, is erroneous in this:

(a) It in effect allowed in full the proof of debt of Scott Litton based upon an alleged confessed judgment against the bankrupt for $33,468.89 with interest from June 2, 1933 and costs of $14.00 although said claim is subject to a credit of more than $3200.00. Said order in effect overruled all objections and exceptions to said claim, both as a secured claim and as a common claim.

(b) It determined that Scott Litton had a lien on $7,457.85 of the funds that came into the hands of the Trustee, such lien being based upon the issuance of writs of fieri facias from the aforesaid purported confessed judgment. Said judgment is void upon its face, mere inspection of the record of the judgment demonstrating its invalidity. It, therefore, cannot be the basis of any lien whatever; nothing can be acquired by it; it cannot be the foundation for the assertion of any claim or title. It is a mere nullity, and in legal effect no judgment at all. In the litigation authorized to be brought by the Trustee said purported judgment was found to be void upon its face by the Circuit Court of Russell County, Virginia. This finding by said Court was affirmed by the Supreme Court of Appeals of Virginia in the case of "Smith vs. Litton," reported in 188 S. E. 214, 167 Va. 214. The peculiar local rules of the State Court which were offered as the basis of its refusal to cancel the void judgment in the particular suit brought by the trustee at the time and in the circumstances in which it was brought

cannot serve to put life into the dead judgment nor to create a valid and subsisting judgment out of a nullity. No person and no court is justified in treating and relying upon the void judgment as though it were a valid judgment.

The said State Court held that it would not set aside (45) the void judgment at the suit of the trustee because Jean McNeil Pepper, Petitioner herein, acquiesced in the distribution of the proceeds of an execution sale had under said judgment, and (as said Court purported to find) Jean McNeil Pepper was the only creditor in the bankruptcy matter of the Dixie Splint Coal Company, the judgment debtor in said purported judgment; and, that it would be inequitable to set aside said execution sale because a third party had received part of the proceeds thereof and would be required to repay such sum so received. Only nine hundred and some odd dollars from the proceeds of the aforesaid execution sale came into the hands of the trustee, and only as to this sum could Petitioner be estopped to point out the invalidity of Scott Litton's asserted lien, even if this Honorable Court in the circumstances feels bound or disposed to adhere to the technical holding of the Supreme Court of Appeals of Virginia, as set forth in the hereinbefore cited case.

(c) For the foregoing reasons the order of February 22, 1937, was in error in directing Petitioner to pay the sum of $621.47 to the trustee. The effect of such order is to require Petitioner, an unsecured creditor, to pay in money to increase the dividend going to a creditor whose claim is based upon a null judgment, the nullity of which is known and judicially established. The order is otherwise inequitable and erroneous because the litigation and the appeal authorized by the trustee was successful in that the finding that the judgment attacked was void upon its face was affirmed.

Petitioner files herewith the record in the suit directed to be brought by the Trustee to test the validity of the purported confessed judgment.

Wherefore Petitioner prays that said order be re-

viewed and reversed and that an order be entered disallowing the claim of Scott Litton as a secured claim, or at least disallowing same as a secured claim as to any funds in the hands of the Trustee other than such as were derived from the proceeds of the execution sale had under the aforesaid purported confessed judgment against the bankrupt and in favor of Scott Litton; that a hearing be directed on the other objections and exceptions to the claim of Scott Litton; that petitioner be restored to all things she has lost by reason of afore-
(46) said errors.

JEAN McNEIL PEPPER,
Petitioner on Review.

(Signed) A. K. MORISON,
(Signed) M. M. HEUSER,
Counsel.

REFEREE'S CERTIFICATE OF MARCH 4, 1937.

(47) (Filed March 4, 1937)

Hon. John Paul, Judge:

Your undersigned Referee in Bankruptcy begs leave to show unto the Court that a petition was filed with your Referee on the 1st day of March, 1937, on behalf of Jean McNeil Pepper a creditor asking the Court to review certain orders entered by the Referee on the 22nd day of February, 1937.

This case was filed under No. 846 at Big Stone Gap, Virginia, on the 4th day of September, 1934, and the order of adjudication was entered on the 7th day of September, 1934. The bankrupt was a coal company, and a corporation. The schedules show indebtedness of more than Fifty Thousand ($50,000) Dollars. Scott Litton was president of the company and seems to have been the principal owner of the stock. At the first meeting of creditors held before the Referee at Lebanon on the 26th day of September, 1934, Scott Litton filed a preferred or secured claim in the sum of Thirty-three Thou-

sand Four Hundred Sixty-eight Dollars and Eighty-nine Cents ($33,468.89). P. H. Smith was elected Trustee at the first meeting of creditors. On December 18th, 1934, Jean McNeil Pepper filed exceptions to the allowance of the claim of Scott Litton. The exceptions were as follows:

(1) That the validity of said judgment has been questioned by the Trustees of said bankrupt corporation, and is now pending; and,

(2) That should it be determined that the said alleged claim is not a prior or preferred lien claim, the same does not constitute a common claim, since the amount claimed under said judgment was never due or owing to the said Scott Litton.

Very soon after the first meeting of creditors was held certain of the general creditors withdrew their claims and finally there were only two claimants, they being Scott Litton and Mrs. Jean McNeil Pepper; that is, after the labor lien creditors had been paid in full. Scott Litton (48) took assignments from several of the laborers whose claims arose more than ninety days prior to the bankruptcy and that part of their claims, of course, being general claims, and also took assignments from some two or three other general creditors and then filed their claims as general creditors in his own name so that the matter finally resolved itself, in effect, into a contest between Scott Litton and Mrs. Jean McNeil Pepper. And they are now the only creditors interested in the bankruptcy proceedings.

Mrs. Pepper filed her claim in the sum of Nine Thousand ($9000) Dollars on the 8th day of November, 1934, formal exceptions were filed to the claim by Scott Litton which were never insisted upon.

On October 15th, 1934, Mrs. Pepper filed a petition setting up that the judgment asserted by Scott Litton against the bankrupt was void and that the same could not be collaterally attacked and must be attacked directly in the Court in which the judgment was awarded. The petition also set up that Mrs. Pepper had various pro-

ceedings pending in the Circuit Court of Russell County, Virginia, asking for relief against the judgment and the petition asked that the Trustee in Bankruptcy be directed to appear in the Circuit Court of Russell County and submit to the jurisdiction of said Court the validity of the alleged judgment in favor of Scott Litton, etc. After the filing of the last named petition, the Referee on the 17th day of October, 1934, entered an order in a measure in accordance with the said petition. After the entering of the order of October 17th, 1934, Scott Litton, by his counsel, filed a petition setting up that they had not been advised of the hearing on the petition above mentioned of Mrs. Pepper and asked the Referee to review his order and grant a hearing thereon and an order was entered on the 3rd day of November, 1934, showing that the order of October 17th, had been entered without notice to Scott Litton and ordering that the matter be reheard and the order reviewed by the Referee at his office in Norton, Virginia, on the 8th day of November, 1934, and a hearing was held on the 8th day of November, 1934, at which time the matter was reheard. Up to that date I. M. Quillen had been Attorney for Scott Litton and had acted as Attorney for the trustee in bringing certain funds into the hands of the Trustee as appears from record, and he resigned as Attorney for the Trustee on the 8th day of November, (49) 1934, and Messrs. Hamilton & Heuser were appointed Attorneys for the Trustee and the Attorneys were directed to file such petition on behalf of the Trustee as they might deem advisable with reference to intervening in any matter that appears to be in controversy in the case. Messrs. Hamilton and Heuser thereafter filed a petition on the 27th day of November, 1934, setting up that they had considered the questions involved in the litigation pending in the Circuit Court of Russell County, Virginia, attacking the validity of a certain judgment confessed by the bankrupt corporation in favor of Scott Litton before the Clerk of said Court, dated June 2nd, 1933 for the sum of Thirty Three Thousand Four Hundred Sixty-eight Dollars and Eighty-nine Cents ($33,468.89) with interest from June 2nd, 1933, and cost $12.50 and that it appears that said judgments and executions issued thereon and a sale made thereunder involved the title to virtually all of the estate of the bankrupt as well as the real estate and that it ap-

peared that said judgment was probably void and would therefore be to the interest of the bankrupt's estate to have the same abated and set aside and all executions thereon quashed, and asked for permission to institute a new and independent proceeding in the Circuit Court of Russell County, Virginia, for the purposes above stated, etc. A hearing was held on said petition after notice to Scott Litton and his Attorneys and to Mrs. Pepper and her Attorneys on the 8th day of December, 1934, and the Referee took the matter under consideration and on the 18th day of December, 1934, entered an order directing Hamilton & Heuser as attorneys for the Trustee to proceed to bring an independent action in the Circuit Court of Russell County, Virginia, for the purpose of testing the validity of the judgment and any and all executions that had theretofore been issued thereon. The order of December 18th shows that all of the parties at interest had notice of the order and afterwards such suit was instituted in the Circuit Court of Russell County, Virginia, and that Court held, in effect, that the trustee in Bankruptcy as well as Jean McNeil Pepper were estopped to deny the validity of the judgment and the executions issued thereon and the sale held under one of the executions. After the matter was decided by the Circuit Court of Russell County, Virginia, Hamilton & Heuser, Attorneys for the Trustee, filed a petition on (50) the 11th day of March, 1935, setting forth that the Circuit Court of Russell County, Virginia, had decided the above named suit against the Trustee in Bankruptcy and asking for authority to apply for writ of error to the Supreme Court of Appeals of Virginia, because the lien of the alleged void judgment had been fastened upon virtually all of the assets in the hands of the Trustee. Notice was given to Scott Litton of the filing of this petition, and he filed an answer thereto. Notice was given to the Trustee, Scott Litton, and Mrs. Pepper of the filing of this petition and setting the matter for hearing before the Referee on the 23rd day of March, 1935. Scott Litton objected to allowing the Trustee to proceed with the appeal and asked that bond for security of costs, etc., be ordered made by Mrs. Pepper before such appeal should be allowed. At the hearing on March 23rd, 1935, all parties at interest were represented and an order was entered requiring Mrs. Pepper to file a bond in the sum of One Thousand ($1000) Dol-

lars to cover all cost and expenses of Appeal as well as Attorneys fees from that date. Mrs. Pepper's counsel excepted to the entering of the order and filed a petition asking the Court to review the order and set it aside. This petition was filed on April 2nd. 1935, and the matter was heard by the Court and an order entered by Your Honor on the 16th day of April, 1935, approving and affirming the above named order of the Referee. The bond in question was filed on the 1st day of April, 1935. The purpose of the bond, of course, being to cover the cost of the appeal, including attorney's fees that might be allowed to attorney's for services rendered in prosecuting the appeal. The Attorneys for the Trustee filed a report with the Referee under date of November 23rd, 1936, reciting that they had been unsuccessful in the appeal, there being a copy of the opinion of the Supreme Court of Appeals of Virginia attached to the report. And in this report the following is stated: "Therefore, we report unto your Court that the validity of the aforesaid judgment in favor of Scott Litton from Dixie Splint Coal Company, Incorporated, in the principal sum of $33468.89 has been established by the said Scott Litton to have been legally confessed in so far as this matter is concerned." Before that date counsel for the Trustee had filed a petition with the Supreme Court of Appeals of Virginia, asking for rehearing and rehearing was denied according to the petition of Hamilton & Heuser (51) filed with the Referee on February 10th asking allowance for their services, etc., in connection with this litigation.

After the filing of the last named petition, the Referee gave notice of hearing to be held at his office on the 22nd day of February, 1937, and at that hearing the orders now asked to be reviewed were entered. The referee did not specifically enter an order dismissing the exceptions filed to the claim asserted by Scott Litton by Jean McNeil Pepper. The Referee was not requested to pass on said exceptions. The Supreme Court of Appeals of Virginia has passed on the validity of the judgment and no motion was made of a hearing on the other exception filed to the proof of claim and as a hearing was not requested and no offer was made to introduce evidence supporting the exception, the Referee assumed that the exceptions had been abandoned and while he did not

enter a specific order dismissing the exceptions, the orders that were entered, in effect, do dismiss the exceptions. The referee overlooked entering a specific order with reference thereto as well as the exceptions to the allowance of the claim of Mrs. Pepper. The Referee considered and now considers that the decree of the Supreme Court of Appeals entirely disposes of all of the questions involved, there being no other creditors interested in this matter except Scott Litton and Mrs. Jean McNeil Pepper. If she was estopped to deny the validity of the judgment in the suit in the Circuit Court of Russell County, Mrs. Pepper would certainly now be estopped to deny the validity of the judgment in this court, and it is now too late for her to question the lien of the judgment of Scott Litton.

The Referee does not undertake to cite the Court full and complete authorities bearing on the questions involved in this petition for review, but he does call attention to the decision in the case of P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, against Scott Litton, 188 Southeastern 214, 177 Virginia ..... and a copy of the Court's opinion being attached to the report of Hamilton and Heuser, filed before the Referee on November 23rd, 1936, and which is numbered 21 in the papers forwarded to the Judge.

Also Davis against Wakelee 156 U. S. 680, 39 L. Ed. 578, 583-5.

Philadelphia against Howard 54 U. S. 13 H. O. W. 307, 14 L. Ed. 157.

Freeman on Judgments 5th Edition, Sec. 631, page 1331.

(52) In checking over the matter, the Referee finds that the first item charged against the bond of Mrs. Pepper is erroneous, because the order directing payment of that item specifically showed that only $23.06 of the same is to be charged against the bond of Mrs. Pepper and the Referee has corrected the order of February 26th, 1937, in that respect, thus showing that the Trustee should collect only the sum of $613.97 from Mrs. Pepper and her surety, and he has advised the Trustee to this effect.

The Referee calls the Court's attention to the fact that

in paragraph A on page 5 of the petition asking for review, it is stated that the order of February 22nd is erroneous, that the judgment is subject to a credit of more than $3200. There is no such credit on the judgment. The property was sold for approximately $3200 but no part of said amount was paid to Scott Litton. It has all been consumed in cost and making payment of royalty to Clinchfield Coal Company, Inc., and the Trustee's report shows that he collected $936.64 of the amount from the Clerk of the Circuit Court of Russell County, Virginia, in whose hands it had been deposited by the Sheriff of Russell County in an interpleader proceeding.

With reference to paragraph B of said petition of page 5 thereof, the Trustee's reports before the Referee show that he collected from the Receivers of Norfolk and Southern Railway Company the sum of $5718.19 after a garnishment proceeding had been filed against said receivers while an execution was outstanding on Scott Litton's judgment issued from the Circuit Court of Russell County, Virginia, on the 19th day of March, 1934, and that said amount was all due Dixie Splint Coal Company, Inc., more than four months prior to the bankruptcy, and the Trustee's report shows that he collected $803.02 from Dominion National Bank after garnishment proceedings had been filed against it on the same execution. These funds were collected from said respective parties with the understanding that they should be distributed to the parties entitled thereto by order of the Referee, the balance of said fund of $7457.85 is made up of the sum of $936.64 above mentioned as collected from the Clerk of Russell County and it therefore appears that said Scott Litton is entitled to have said funds paid to him subject only to proportional part of (53) cost of administration and taxes, etc.

With reference to paragraph C, page 6 of the petition for review, it is noted that the Referee has corrected his order to read $613.97 and the record in this case shows clearly that the bond was executed by Mrs. Pepper to cover these very items and after she pays the above amount there will not be funds sufficient outside of the funds to which Scott Litton's lien attached to pay all of the costs of administration, etc., and Mr. Litton's funds will of necessity have to be charged with the same;

this cannot be exactly calculated at this time because all of the different items have not yet been approved.

The Referee assigns the foregoing as his reasons for the orders of February 22nd.

(Clerk's Memorandum: Here an enumerated list of papers and documents sent by the referee to the District Judge is omitted by direction of counsel)

(Counsel's Note):

(List of papers sent up and names to whom copy sent omitted.)

Respectfully submitted this March 4th, 1937.

(Signed) JOHN ROBERTS.

ORDER OF DISTRICT COURT APRIL 21, 1937.

(54) (Filed April 22, 1937)

Jean McNeil Pepper, a creditor of the above named bankrupt, having heretofore filed her petition for a review of an order entered by the Referee on February 22, 1937, and the Court having considered said petition for review and the said order which is sought to be reviewed and the arguments of counsel thereon;

Now, therefore, after due consideration of the same, and for reasons which have this day been stated in a written memorandum by the Court and filed as a part of the record in this cause, it is

ORDERED

that the said order entered by the Referee on February 22, 1937, be, and the same is hereby, reversed and set aside.

And it is further ORDERED

that the subject matter of said order of February 22,

1937, be further inquired into and determined by the Referee in accordance with the views expressed in said memorandum of the Court of this date and that further proceedings in this cause be had in conformity with the views therein expressed.

The Deputy Clerk of this Court at Big Stone Gap will forward an attested copy of this order to A. K. Morison, Esq., Attorney at Law, Bristol, Tennessee, a similar copy to M. M. Long, Esq., Attorney at Law, Lebanon, Virginia, and a copy to John Roberts, Esq., Referee in Bankruptcy, Norton, Virginia, and will likewise send to the said Referee in Bankruptcy all papers in this cause, including the memorandum of the Court this day filed.

MEMORANDUM BY THE COURT.

(55) (Filed April 22, 1937)

(Court and Title of Cause Omitted).

Jean McNeil Pepper, a creditor, has petitioned for a review of an order entered by the Referee on February 22, 1937, the effect of which was to hold that a debt of Scott Litton was a secured debt and entitled to payment as such.

A chronological history of the matter in controversy is substantially as follows:

The Dixie Splint Coal Company is a family corporation of which Scott Litton is the principal stockholder; he is likewise President of the corporation. Other stockholders are his wife, his father-in-law and two brothers-in-law. The only other stockholder is one P. H. Smith, whose relationship to Scott Litton if any, is not disclosed.

On July 1, 1931, A. P. Pepper instituted a suit in the Corporation Court of the City of Bristol against Dixie Splint Coal Company and Scott Litton for an accounting of the royalties due to Pepper in respect to coal taken from lands of which Pepper was owner and which Dixie Splint Coal Company was operating under a lease. This

suit was pending for sometime during which A. P. Pepper died, and the litigation was carried on by Jean McNeil Pepper as executrix of A. P. Pepper.

On June 2, 1933, while the suit in Bristol was pending and probably in anticipation of its outcome, P. H. Smith, described as Secretary and Treasurer of the Dixie Splint Coal Company, appeared in the Clerk's Office of Russell (56) County and caused the entry of a judgment by confession against the Dixie Splint Coal Company in favor of Scott Litton for $33,468.89. Execution was issued on this judgment on the day of its confession but no return was made thereon.

On February 19, 1934, a judgment was rendered in favor of Jean McNeil Pepper, Executrix, against Dixie Splint Coal Company for $9,000, in the suit pending in Bristol. On motion of the defendant, execution on the judgment was suspended for ninety days to permit an appeal. Bond was fixed at $500.00. Apparently the defendant, after obtaining the stay of execution, decided not to prosecute an appeal from the $9,000 judgment against it. On the other hand, the complainant herself took an appeal on other phases of the case (See Pepper v. Dixie Splint Coal Company, 165 Va. 179).

On March 19, 1934, another execution was issued on the confessed judgment of Scott Litton against the Dixie Splint Coal Company and on the same date was levied upon the tangible personal property of the Coal Company.

On May 31, 1934, an execution was issued on the $9,000.00 judgment in favor of Jean McNeil Pepper, Executrix, and levied on the property of the Coal Company on June 2, 1934. On the same day that the Pepper execution was levied, the sheriff gave notice of a sale of the property to satisfy the Litton judgment, the sale to be held on June 14, 1934. Just when Mrs. Pepper learned of the existence of the Litton judgment does not appear. It may have been before the notice of sale was given or this advertisement may have been her first knowledge of it; I do not know as to this. However, about this time, Mrs. Pepper instituted a suit in the Circuit Court of Russell County to have the Litton judgment declared void. The

record does not show the date on which this suit was instituted but from a statement in one of the briefs I am informed that the bill was filed on June 13, 1934, the day before the sale under the Litton execution. The sale under the Litton execution was held on June 14th and Litton himself became the purchaser of the property sold at the sum of $3,200.00.

On the day following this sale the sheriff filed a petition in court reciting the sale and stating that he had (57) been notified by the Clinchfield Coal Corporation that it had a prior lien on all the property for a debt of $2,153.00 and demanding that so much of the proceeds of the sale as were necessary to pay this debt be paid to it. The petition of the sheriff was that Litton, Jean McNeil Pepper, executrix, and the Clinchfield Coal Corporation be interpleaded and compelled to answer and state their respective rights in the fund. No one seems to have questioned the prior rights of the Clinchfield Coal Corporation. Litton answered, admitting the right of the Clinchfield Corporation to have its lien paid out of the fund, and claimed the balance of the fund on his execution. Mrs. Pepper answered and (omitting formal recitations) her answer is as follows:

"Without prejudice to her rights and claims asserted in the chancery cause of Jean McNeil Pepper, executrix, etc., against Scott Litton, et al., now pending in the Circuit Court of Russell County, Virginia, the general subject of which is to set aside and have declared void the judgment under which the sale was made, from which M. C. Chafin, Deputy Sheriff for N. F. Castle, derived the fund here in question, answers that she admits the priority of the lien asserted by Clinchfield Coal Corporation in the sum of Two Thousand One Hundred and Fifty Three Dollars ($2,153)."

On July 18, 1934, an order was entered in the Circuit Court of Russell County directing the payment of $2153 to the Clinchfield Coal Corporation; the balance of the fund was retained in custody of the Court. I have quoted above the answer of Mrs. Pepper in the interpleader proceeding because of its important part in later proceedings.

On September 4, 1934, Dixie Splint Coal Company filed its voluntary petition in bankruptcy; the order of adjudication was on September 7th and the first meeting of creditors was held on September 26th. At this meeting, as shown by the minutes, the claim of Scott Litton for $33,468.89 was filed as a preferred or secured claim. The claim bears the signature of I. M. Quillen as attorney for Litton. The same attorney is one of the firm of Quillen and Quillen who prepared and filed the petition in Bankruptcy as attorneys for Dixie Splint Coal Company and appeared at the meeting as counsel for the bankrupt. A number of other claims were also filed, most of these being labor claims. There were only three general claims filed. At this meeting, P. H. Smith was chosen Trustee and was authorized to employ I. M. Quillen as attorney for the Trustee. The minutes of this meeting and orders entered show that the controversy (58) between Mrs. Pepper and Litton over the latter's judgment was known and recognized, although Mrs. Pepper did not file her formal proof of claim in the bankruptcy proceeding until November 8, 1934.

On October 6, 1934, Mrs. Pepper in prosecution of her pending suit in the Circuit Court of Russell County to have the Litton judgment canceled and avoided, submitted her motion in that Court to quash all executions issued and outstanding on that judgment. Upon hearing of this motion, Mr. Quillen, still acting as attorney for Litton, appeared *in opposition* to the motion, contending that the intervention of bankruptcy had deprived the state court of further jurisdiction in the matter. The Judge of the State Court, without passing upon the question of his jurisdiction, continued the motion, apparently for the proper reason that he wished to have clarified the position of Mr. Quillen.

Thereupon, on October 15, 1934, Mrs. Pepper filed a petition before the referee in which she recited her motion in the State Court to quash the execution, the opposition thereto, and asked that the trustee be directed to appear in the State Court and submit to that Court the adjudication of the validity of the Litton judgment and that the State Court be requested to proceed with such adjudication. While this petition states that the attorney for the trustee had appeared in opposition to the

motion to quash, it is asserted by Mr. Quillen that he appeared as attorney for Litton and not for the trustee, and the answer filed by him is on behalf of Litton. When Mrs. Pepper filed her petition on October 15th, asking that the trustee be directed to proceed in the State Court, Mr. Quillen objected to granting the prayer of the petition, stating that he did so as attorney for Litton. After some delay, a meeting of creditors was held on November 8, 1934, at which I. M. Quillen resigned as counsel for the trustee and M. M. Heuser and C. W. Hamilton were designated to serve in that capacity. Shortly thereafter these last named attorneys informed the Court that in their opinion the Litton judgment was void and they asked authority for the trustee to institute a new and independent suit in the Circuit Court of Russell County to have it declared void. By an order of December 18, 1934 this authority was granted.

It may be here said that between the time of the first meeting of creditors and the institution of the suit by the Trustee attacking the Litton judgment, certain gen-
(59) eral creditors withdrew their claims for some reason. There were also certain claims for labor which, due to the fact that the services had not been rendered within 90 days, took the status of general claims. Litton bought these claims. So that, at the time the Trustee instituted suit in the State Court, Mrs. Pepper apparently was the only general creditor concerned in the proceeding.

The foregoing lengthy recital of facts has been deemed advisable for a better understanding of the reason for conclusions hereinafter stated and views hereinafter expressed.

The Trustee in Bankruptcy, represented by Heuser and Hamilton, as authorized to do, instituted suit in the Circuit Court of Russell County seeking to have the Litton judgment declared void. As a result of that litigation, the court denied the relief prayed for and dismissed the proceeding. The Court expressed the view that the judgment was plainly void but held that the Trustee was estopped to deny its validity. This estoppel, so the Court held, arose from the fact that Mrs. Pepper had filed her answer in the interpleader proceedings brought by the

sheriff and had, in such answer, admitted the prior lien of the Clinchfield Coal Corporation. This action, the Court held, constituted a recognition of the validity of the fund from which the Clinchfield Corporation was demanding payment and which fund had been derived by an execution sale under the Litton judgment; that it was a recognition of the validity of the Litton judgment which estopped Mrs. Pepper from further question of that judgment. It further held that, inasmuch as Mrs. Pepper appeared to be the only then existing general creditor of the bankrupt estate, the estoppel against her acted also to estop the Trustee in Bankruptcy who represented her and whose action was for her sole benefit. The attorneys for the Trustee, having procured authority to do so, took an appeal from the judgment of the Circuit Court of Russell County to the Supreme Court of Appeals of Virginia, which Court affirmed the holding of the lower Court. (See Smith v. Litton, 188 S. E. 214).

The Trustee having reported to the Referee the affirmation by the Appellate Court of the judgment of the Circuit Court of Russell County, a creditors meeting was held on February 22, 1937, for the purposes of allowing certain costs, expenses, etc., and determining the amount of the fund subject to the Litton judgment. Shortly (60) after the first meeting of creditors Mrs. Pepper had filed formal exceptions to the allowance of Litton's claim on the ground that it was based on a void judgment. This was done in support of and consistent with the attack which she was making on the judgment in her then pending suit in the State Court, and for protection of her rights in the bankruptcy court. The Referee was not called on to act upon these exceptions pending the outcome of the litigation in the State Court.

At the meeting of February 22, 1937, the Referee, acting on the basis of the holding of the State Court, held that the lien of the Litton judgment attached to the larger part of the fund in the hands of the Trustee. The Referee did not specifically pass upon the exceptions filed to the allowance of the Litton claim. In his certificate of review, he states that "while he did not enter a specific order dismissing the exceptions, the orders that were entered, in effect, do dismiss the exceptions. * * *

The referee considered and now considers that the decree of the Supreme Court of Appeals entirely disposes of all questions involved, there being no other creditors interested in this matter except Scott Litton and Mrs. Jean McNeil Pepper. If she was estopped to deny the validity of the judgment in the suit in the Circuit Court of Russell County, Mrs. Pepper would certainly now be estopped to deny the validity of the judgment in this Court, and it is now too late for her to question the lien of the judgment of Scott Litton." It is this order of February 22, 1937, which is before me for review.

The last sentence in the foregoing quotation from the certificate of the Referee presents the view which explains his reason for holding that Litton was a secured creditor as to this fund; but it indicates a misunderstanding on the part of the Referee as to the duties and responsibilities of the bankruptcy court—duties which that court cannot delegate or ignore. Responsibility for the administration of estates in bankruptcy rests in this court alone and it is a responsibility which this court cannot abdicate.

In this case, the bankruptcy court, not from necessity but through comity, sought the aid of the State Court to determine a question material to the administration of the bankrupt estate, that question being whether a judgment entered in the Clerk's Office of that State Court was a valid judgment. The State Court did not adjudge either that the judgment was valid or that it was void. (61) It held that because of some prior proceeding in that Court, to which one of the creditors of the bankrupt had been a party, neither that creditor nor the Trustee who represented that creditor's interest, could not be heard in that Court to challenge the validity of the judgment. The trial judge in the State Court recognized the limitations of his action when he said in his opinion "this court does not undertake to pass upon the validity of any claim made or to be made against the bankrupt, nor to the disposition to be made of the assets of the bankrupt estate".

The holding of the State Court that the Trustee was estopped to attach the judgment there does not prevent

this Court from considering its validity with respect to the administration of the bankrupt estate. See Lesser v. Gray, 236 U. S. at p. 74, where it is said:

"A bankruptcy Court in which an estate is being administered has full power to inquire into the validity of an alleged debt or obligation of the bankrupt upon which a demand or claim against the estate is based."

See also Continental Engine Company (C. C. A. 7) 234 Fed. 58, where it was held that when a claim founded on a judgment rendered in the State Court was presented and its allowance sought in bankruptcy proceedings, it was not immune from attack by creditors who would be adversely affected by its allowance and the bankruptcy court had power to pass on its validity.

In Chandler v. Thompson (C. C. A. 7) 120 Fed. 940, a claim based on a judgment entered by confession in a state court was presented in the bankruptcy court and another creditor objected to its allowance on the ground that the confession of judgment was fraudulent. A holding of the lower court that the judgment could be impeached only in the court where it was rendered, was reversed by the Circuit Court of Appeals with directions to the District Court to inquire into the validity of the claim.

It is not necessary, in order for this Court to pass upon the validity of the Litton debt, to hold that the State Court was in error. I confess that I am unable to see that the action of Mrs. Pepper in filing an answer in the interpleader proceeding constituted an estoppel. Confronted with the process of the Court she filed an answer, as it was proper she should do. In this answer, she did nothing more than to admit the existence of a single undisputed fact, while at the same time insisting upon the (62) invalidity of the judgment. Her answer sought no advantage for herself nor disadvantage to anyone else. The sale had already been made; she did not consent to it. The rights of no person were altered or sought to be altered by her answer. It seems to me also that in holding that the Trustee was estopped, the State Court failed to consider *anothing* thing. It may be that at the time suit was brought by the Trustee Mrs. Pepper was

the only general creditor whose claim was then pending in the bankruptcy proceeding. The record does not establish this, but it is asserted, without denial, and I assume it to be true. But creditors in bankruptcy have six months from the date of adjudication within which to file their claims. The suit was brought before the expiration of that time. And in a situation of this sort, the Trustee represents all creditors who may benefit by his action, including all excepting secured creditors. The Trustee was not acting as representative of Mrs. Pepper alone. He was an officer of the bankruptcy court charged with the duty of conserving and protecting the interest of all creditors who might profit by his action and any action he took was not only on behalf of those who up until then had proved their debts but equally on behalf of others who might thereafter legally prove debts.

But, as I have stated, a determination of the matters here involved does not rest upon the question of the priority of the State Court decision. Whether that decision be one with which I concur or from which I dissent, it cannot affect the responsibility and the duty of this Court to act rightly upon those matters as to which it has been invested with the power and responsibility of acting.

It would be a strange situation if this Court, or any other, in a matter pending solely before it, were compelled to confess itself powerless to prevent the perpetration of such gross and obvious fraud as has been sought to be accomplished here. To do so would be to admit that the courts are without power to administer justice.

An examination of the facts disclosed here shows the history of a deliberate and carefully planned attempt on the part of Scott Litton and Dixie Splint Coal Company to avoid the payment of a just debt. I speak of Litton *and* Dixie Splint Coal Company because they are in reality the same. In all the experience of the law, there has never been a more prolific breeder of fraud than the one-(63) man corporation. It is a favorite device for the escape of personal liability. This case illustrates another frequent use of this fiction of corporate entity, whereby the owner of the corporation, through his complete con-

trol over it, undertakes to gather to himself all of its assets to the exclusion of its creditors. A mere brief recital of the facts here is convincing that this was the case.

While the suit by Mrs. Pepper against Litton and Dixie Splint Coal Company was pending in Bristol, Litton caused the Dixie Splint Coal Company to confess a judgment in his (Litton's) favor in the Clerk's office of Russell County. Perhaps it would be more accurate to say that he attempted it, because it seems to be generally conceded that there was no compliance with the statute and that the judgment is void. There would seem no doubt that this attempted confession of judgment was in anticipation that Mrs. Pepper would get a judgment in the pending suit. The instrument or agent whereby the confessed judgment was entered was P. H. Smith, designated as Secretary and Treasurer of the Dixie Splint Coal Company, and, of course, an employee of Litton and subservient to the latter's will.

Having gotten the so-called confessed judgment, Litton waited quietly until the outcome of the Pepper suit was definitely known. As soon as Mrs. Pepper got her judgment for $9,000, the Court was induced to suspend execution on it for ninety days upon the representation that an appeal was contemplated. No appeal was taken, but instead Litton returned to Russell County, and, while execution on the Pepper judgment was suspended, caused an execution to issue on his confessed judgment. That Litton had no intention of trying to satisfy his confessed judgment against the Dixie Splint Company unless and until it became necessary to do so, but was using it only as a shield against the Pepper debt, is shown by the manner in which the execution on the confessed judgment was handled. It was issued on March 19, 1934, and a levy made the same day, but nothing was done at that time toward a sale of the property levied on. On May 31, 1934, Mrs. Pepper caused an execution to issue on her judgment which was levied on June 2nd; and this same date (June 2nd) the sheriff, who seems to have been cooperating with Litton, advertised the property for sale under the Litton levy made over two months before.

Thereafter, feeling confident that his confessed judgment would cover and consume the assets of his Dixie Splint Company, Litton caused that company to file a (64) voluntary petition in bankruptcy. An examination of the schedules in bankruptcy shows the purpose and bad faith of this step. The bankrupt had at that time $4,500 in bank and had notes and accounts receivable to the amount of over $12,000 most of which was good. The money in bank alone was more than sufficient to pay all creditors with the exception of Mrs. Pepper. The bankruptcy was plainly for the sole purpose of avoiding payment of the Pepper debt. In the course of the bankruptcy, Litton, in an effort to better his position took assignments from a number of workmen who had unsecured claims and in some manner caused other claims to be "withdrawn". This course enabled the situation to be created whereby Mrs. Pepper was made to appear as the only general creditor and made possible the holding that the Trustee, as her representative, was estopped to attack the Litton judgment.

It would be a travesty upon the administration of justice if this Court were to countenance the perpetration of such fraud as is disclosed here or confess itself unable to prevent it.

There are several matters in this case that call for reproof. It is plain that P. H. Smith, should not have been selected as trustee. It does not appear upon whose suggestion or nomination he was so selected, but it should not have been permitted. Smith was the man who had attempted to confess the disputed judgment which was then in controversy; he was an employee of Litton, and was not in position to be an earnest and aggressive representative of the general creditors.

It is equally plain that I. M. Quillen should not have been selected as attorney for the trustee. His firm represented the bankrupt and prepared and filed the petition in bankruptcy. He himself represented Litton and appeared for and filed Litton's claim at the first meeting of creditors. In spite of this and in the face of the known question as to the Litton judgment he was made attorney for the trustee whose duty it was to attack the Litton judgment. It is generally accepted that

an attorney for the bankrupt should not be chosen attorney for the trustee in any case. And it is even more evident that an attorney who represents a creditor whose claim is under attack should not be chosen as attorney for the trustee who, on behalf of other creditors, is charged with the duty of making that attack.

It is said that Mr. Smith was chosen trustee because (65) of his familiarity with the affairs of the bankrupt and that no creditor objected to his selection. It is said on behalf of Mr. Quillen that at the time of his appointment as attorney for the trustee the necessity for someone to act in such capacity was considered primarily with a view to collecting certain sums owing the bankrupt and that little or no thought was had of the controversy over the Litton judgment. But it is nevertheless a fact that the controversy over the Litton judgment was known at that time and it should have been evident to everyone concerned that the trustee would inevitably become a party to that controversy.

It was likewise inevitable that the conflicting positions occupied by Mr. Smith and by Mr. Quillen would become the subject of question and criticism. That they did is shown by a letter from the judge of the state court written to the referee on November 6, 1934, in the course of which it was said:

"Recently a motion has been made in this Court by counsel for Pepper, executrix, to quash the execution issued upon the Litton judgment, and that motion is still pending here. * * *

"Mr. I. M. Quillen, an attorney of this place, is counsel for Scott Litton in the proceeding to quash the foregoing execution and for Mr. Litton is opposing the quashing thereof. He is also attorney for the trustee in bankruptcy, as I am advised whose duty it would be to ask that the execution be quashed, under the order recently entered."

At this time, Mr. Quillen, although he had been selected as attorney for the trustee on September 26th, continued to act as attorney for Litton and had appeared

on behalf of Litton in the State Court on October 6th in opposition to the motion to quash execution on the Litton judgment. His asserted ground of opposition was that no action affecting the judgment could be maintained except by the trustee in bankruptcy. Yet when Mrs. Pepper thereafter on October 16th asked the bankruptcy court to direct the trustee to proceed against the judgment, Mr. Quillen, still acting for Litton, opposed this action, in deregation of the rights of the trustee whom he had been selected to represent. That counsel for Mrs. Pepper should have been confused as to the status in which Mr. Quillen was acting was excusable.

It is not the opinion of the Court and it is not intended to suggest that Mr. Smith or Mr. Quillen in accepting the respective positions of trustee and attorney for the trustee did so with any fraudulent plan or intention of utilizing their positions in aid of Litton and (66) to the detriment of the estate which they represented, or that their activities in such positions were with any such purpose. It is intended, however, to point out that the impropriety of their selection should have been evident; that they occupied incompatible and conflicting positions; that such situations invoke suspicion and disrespect for the administration of the law. They should not be allowed to arise; or having arisen, should be terminated as quickly as they are recognized.

The order of the Referee of February 22, 1937, will be reversed in so far as any of its provisions are based upon the supposed validity of the Litton judgment. There has been no adjudication of the validity of this judgment by the Referee and no formal adjudication of the exceptions filed in the bankruptcy court to the allowance of the Litton claim. It seems generally conceded that the Litton judgment is void, but I think this should be definitely determined. The proceedings will be remanded to the Refere with instructions to pass upon the status of the Litton claim from the standpoint of whether or not the judgment is void. If it is determined that the judgment is void and if Litton shall then desire to pursue his claim as a general creditor, then inquiry should be made into its validity as a general debt. In directing this court, the Court does not commit itself as to any action it may hereafter take in allowing

or disallowing the claim. That action must wait upon a full disclosure of the facts regarding it.

It is further directed that no allowance be made from the bankrupt estate to I. M. Quillen for any alleged services as attorney for the trustee in connection with proceedings involving the Litton judgment.

It is further directed that for the present Mrs. Pepper is not required to pay the amount charged against her bond given in the appeal from the Circuit Court of Russell County and which, if I understand correctly, is $613.97. The items shown in this account seem to be proper in amount, but whether this should be paid by Mrs. Pepper or as an expense of the estate will await determination of the other questions upon which the Referee is herein required to pass.

I am not familiar enough with the various items of expense, etc., set forth in the order of February, 1937, but no payment of any sort should be made which is not appropriate to and in propriety with the views which I have expressed herein.

April 21, 1937.

(Signed) JOHN PAUL,
District Judge.

NARRATIVE OF PROCEEDINGS BEFORE REFEREE AUGUST 23-27 AND SEPTEMBER 10, 1937.

(67) Filed August 10, 1938

AUGUST 23, 1937:

PRESENT: John Roberts, Referee, W. T. Bowen, Trustee, C. W. Hamilton, Counsel for Trustee, M. M. Heuser, Counsel for Mrs. Pepper, Henry Roberts, M. M. Long and I. M. Quillen, Counsel for Scott Litton.

MOTION BY MR. HEUSER AS TO LITTON JUDGMENT: We understand the case was referred back to the Referee by the District Court to pass upon the ex-

ceptions filed to the claim of Scott Litton. We desire the Referee to pass upon the validity of the purported judgment on which Scott Litton's claim is based. It is our position that the judgment is utterly void. We rely upon the opinion of Judge A. G. Lively, which appears in the record in this case. We do not mean to say the reasons Judge Lively gave for holding the judgment was void are the only reasons but we think they are sufficient. Our position is that the judgment is utterly void upon its face, because of non-compliance with the statutes of Virginia relating to the confession of judgments. The failure of the person attempting to confess a judgment to file with the clerk any authority for confessing judgment on behalf of the Dixie Splint Coal Company is the vice in the purported judgment.

OBJECTION OF SCOTT LITTON STATED BY HENRY ROBERTS: Our position is that under the decision in the case of Big Vein v. Browning, 137 Virginia, 34, that the paper confessing the judgment being under seal, imported all the authority necessary under the statute, in the absence of anything else. That de-
(68) cision applied to the fact that it was confessed under the seal of the corporation, and was sufficient to uphold the validity of the judgment.

We further object to the consideration of the question of the validity of the Litton judgment because Jean McNeil Pepper is estopped from questioning the validity of that judgment. We think it is *res judicata,* and that Mrs. Pepper is estopped from questioning it in any way, shape or form.

MOTION FOR APPRAISAL BY MR. HEUSER: Jean McNeil Pepper, creditor, now moves the Court to appoint three disinterested and qualified persons to appraise the tangible property of the bankrupt that was purportedly sold under the levy of an execution from the void judgment against the bankrupt in favor of Scott Litton on June 14, 1934; and to direct such appraisers to ascertain the fair market value of the tangible property on June 14, 1934, as well as its present market value, and the reasonable monthly or annual rental thereof; and to report to the Court what they do under such directions as soon as may be. This motion is made

pursuant to the provisions of Section 70-B of the Bankruptcy Act, which is U. S. C. A. Title 11, Section 110.

OBJECTIONS TO APPRAISAL BY HENRY ROBERTS: Scott Litton objects to the motion for an appraisal because the record does not show that the bankrupt had at the time of adjudication as a bankrupt, or afterward, any tangible property, so that there was and is no tangible property to appraise. In no event is the present market value of the tangible property a material question in the case.

The printed record in the Supreme Court of Appeals (69) of Virginia in the case of P. H. Smith, Trustee against Scott Litton shows that the sale in question was made on June 14, 1934; that on June 13, 1934 (p. 83) Mrs. Pepper filed her bill in the Circuit Court of Russell County, setting up her judgment for $9,000 and the execution thereon, and the Litton judgment for $33,468.89, and the execution thereon, under which the tangible property of Dixie Splint Coal Company was then advertised for sale on June 14, 1934, and alleging among other things that the confession of the judgment in favor of Litton was fraudulent and also that it was void on its face. The prayer of the bill asked that the advertised sale be enjoined; that the judgment be held void and for general relief. No injunction was applied for, and the record shows that Mrs. Pepper afterward acquiesced in the distribution of the proceeds of the sale or a part thereof to the Clinchfield Coal Corporation, and that the balance of the proceeds of the sale were with her consent paid over to the Trustee in Bankruptcy.

The record further shows that the defendants answered the Bill on July 5, 1934, and each of them denied the allegations of fraud in the Bill. No further proceedings were had in the case except it was later dismissed on motion of Mrs. Pepper. If Mrs. Pepper ever had any right to question the validity of the sale it was in that suit and she has no right to do so now, nor does she have any right to raise the question of the value of the tangible personal property sold after she filed her bill, and at which sale she had the right to help determine its value by bidding on it. The best way to fix the fair market value of the property was at public sale.

This property was sold at public sale and that is the (70) best appraisal of its value.

The printed record further shows (p. 88) that the Sheriff filed a petition of Inter-pleader and the parties were convened by Order of the Court, the petition stating that both Litton and Mrs. Pepper claimed the proceeds of the sale upon their respective writs of fieri facias, and that the Clinchfield Coal Company claimed priority thereto in the sum of $2153.00.

The record (p. 91) shows that Mrs. Pepper filed her answer in the Inter-pleader case admitting the priority of the Clinchfield claim. If Mrs. Pepper ever intended to raise any question about the value of the property or the validity of the sale, it was then and there the time for her to raise the questions, and she cannot now come here, more than three years after the sale of the property, and ask for its appraisal. She is guilty of laches if it were an open question. The question is *res judicata* and Mrs. Pepper is estopped.

REPLY BY MR. HEUSER: We rely upon the fundamental proposition if the judgment is otherwise completely void any sale under it is likewise void, and the purchaser can take no title.

BY THE REFEREE: None of the questions presented will be decided until after the conclusion of the hearing and the taking of the proof.

CROSS EXAMINATION OF SCOTT LITTON BY MR. HEUSER: As Mr. Litton is here we want to ask him a few questions under the rules of cross examination.

OBJECTION BY MR. HENRY ROBERTS: In order to keep the record right, and without repeating the same objection over and over, it is understood we take the position that the questions under consideration, and all other questions which are raised by Mrs. Pepper are *res judicata*, and she is estopped from raising the ques- (71) tions she is raising, but we are going ahead with the hearing in response to the Order of the District Judge and the Court of Appeals and the rulings of the

Referee, without waiving our objections as to any of these matters, and without repeating them any more.

In response to questions asked by Mr. Heuser, Scott Litton stated:

I am the same Scott Litton in whose favor Dixie Splint Coal Company confessed the judgment in the Clerk's Office of the Circuit Court of Russell County, Virginia, for $33,468.89, with interest from June 2, 1933, and $13.25 costs. Dixie Splint Coal Company actually owed me that sum of money, for services, salary, regular salary they had not paid me, that the corporation had not paid me since it was organized. That sum represented the balance due by this corporation to me. The salary paid me was $1,000.00 a month.

X8. Your salary was unpaid for virtually three years at the time of the judgment? A. During that period of the accumulation of this salary I only took out such money as I felt the corporation could pay without crippling it, and I nursed it along through the depression trying to save the corporation. That unpaid portion was credited to me.

X9. The $12,000 a year salary to you had the effect of crippling the corporation, didn't it? A. Well, any answer to that question would be a judgment and opinion about it. I don't think it did in fact cripple it. I think by not taking it out it made it possible for the company to go along until such time — until it was able to pay (72) it.

During that period the corporation did not pay P. H. Smith to the extent of the accumulation of quite a large portion due Mr. Smith.

X13. The unpaid portion of Mr. P. H. Smith's salary was something like seven or eight hundred dollars at the time of the bankruptcy of the corporation? A. Possibly. I don't recall the exact amount.

He was paid $500.00 a month, I believe. That was his fixed salary. All of it was not paid. I don't think we had any other salaried officers or employees giving all their time to the company at that time.

X16. Can you state for what reason it was the judgment was confessed at the time it was confessed, and not some time sooner, or that the corporation didn't give you notes, or other evidences of its indebtedness to you? A. It was discussed there at the Directors' Meeting and a resolution was put down by the Board of Directors directing that the confession of judgment be made. It was by the action of the Board that the confession of judgment was directed at that time.

The judgment was confessed pursuant to the following resolution found on page 140 of the minutes:

"At a special meeting of the Board of Directors of the Dixie Splint Coal Company, held at its principal office at Clinchfield, Virginia, on May 31st, 1933, after due and legal notice thereof had been given, the following directors being present: P. H. Smith, Pauline Jones Litton, and Scott Litton. Scott Litton, acting as Chairman and P. H. Smith acting as Secretary.

"The object of this meeting was to consider a demand (73) made upon the company by Scott Litton for certain monies which the corporation was then due him in the amount of $33,468.89. Mr. Litton stated to the meeting that some disposition of the account must be made, therefore, it was moved by P. H. Smith and seconded by Pauline Jones Litton that judgment in that amount be confessed by the corporation in favor of Scott Litton to avoid other costs, etc.

"There being no further business before the meeting and upon motion it adjourned.

SCOTT LITTON, Chairman.

P. H. SMITH, Secretary.

P. H. SMITH

.....

Directors."

Asked to refer to the entries in the ledger of the Dixie Splint Coal Company, the witness stated that Account No. 450, Salaries of Officers, showed that the

salaries were credited each month from year to year, and that the ledger contained the records for all the years from 1928 to 1934, inclusive, and that his salary was reduced from $12,000 to $10,000 for the year 1933; that the salaries were paid to the officers, Smith and Litton, or rather credited to their accounts, $10,000 to Litton and $5,000 to Smith, for 1933.

That Account No. 119, headed "Scott Litton, Personal", in said ledger, included the salary account of the witness, and that Account No. 119-A, headed "P. H. Smith, Personal", reflected the salary account of P. H. Smith.

A. This salary was voted to me by the Directors and (74) charged up currently each month, and it appears in the records as far back as we have them.

(NOTE: The ledger of Dixie Splint Coal Company contains several hundred pages, and the sheets reflecting Accounts Nos. 119, 119-a and 450, were not all found in the ledger during the hearing on August 23rd. After the hearing all the sheets were found in the ledger and were copied into the report of the proceedings at the end of the proceedings of August 23rd, and are copied in this narrative, as follows:)

LEDGER SHEET — SCOTT LITTON — PERSONAL

(75) Account No. 119

Date 1928	Memorandum	Reference	Debits	Credits
Jan. 1	1928	CJ	1,978.20	
" 31		CJ 5		500.00
"		CJ 9	1.00	
Feb. 11		CJ 10	142.42	
Feb. 12		CJ 12		500.00
Mar. 8		CJ 15	2.50	
" 31		CJ 18		500.00
Apr. 20		CJ 19	6.01	
" 9		CJ 20	30.20	
" 30		CJ 22	1,100.00	500.00
May 2		CJ 23	1.30	
May 31		CJ 24	1.70	
" "		CJ 25		500.00
" "		CJ 26	1.20	
June 30		CJ 29	450.00	500.00
		28		
July 31		CJ 32		500.00
Aug. 29		CJ 34	16.96	
" 31		CJ 35		500.00
Sept. 29		CJ 38	2,000.00	500.00
Oct. 31		CJ 39	2.00	
" 31		CJ 43		500.00
Nov. 26		CJ 48	29.93	
" 30		CJ 49		500.00
Dec. 18		CJ 52	3.00	
" 31		CJ 56		500.00
" 31	To Close		233.58	
			6,000.00	6,000.00
1929				
Jan. 1	1928 Ledger	CJ		233.58
" 31		CJ 2	1.00	
" 31		CJ 4	12.33	
" 31		CJ 5		500.00
Feb. 12		CJ 8	3.66	
" 28		CJ 12	18.00	500.00

LEDGER SHEET — SCOTT LITTON — PERSONAL

Account No. 119

Date 1929	Memorandum	Reference	Debits	Credits
Mar. 8		CJ 13	7.00	
" 30		CJ 18		18.00
" "		CJ 15	39.05	
" "		CJ 17		500.00
(76) Apr. 30		CJ 19	3.00	
" "		CJ 20	500.00	500.00
" "		CJ 22	1,000.00	
May 31		CJ 25		500.00
June 16		CJ 26	2.25	
" 30		CJ 28		500.00
July 31		CJ 30	2,896.96	2,500.00
Aug. "		CJ 32	1.00	
" "		CJ 33	13.40	
" "		CJ 34		500.00
Sept. 30		CJ 38		500.00
Oct. 24		CJ 41	7.62	
Oct. 29		CJ 42	45.64	
" 31		CJ 44/43	4.50	
			11.49	500.00
Nov. 22		CJ 48	30.00	
" 30		CJ 49	100.00	
" "		CJ 51		500.00
			(Sheet No. 2)	
Dec. 31		CJ 53	7.00	
" "		CJ 54	800.00	
" "		CJ 57		500.00
" "	To Close		2,747.68	
			8,251.58	8,251.58
1930				
Jan. 1				2,747.68
Jan. 31		CJ 4	112.76	
" "		CJ 6		500.00
Feb. 14		CJ 9	1,007.84	
" 28		CJ 12/11	75.30	500.00
Mar. 28		CJ 15	109.73	
" 31		CJ 17/16	1,000.00	500.00

LEDGER SHEET — SCOTT LITTON — PERSONAL

Account No. 119

Date 1930	Memorandum	Reference	Debits	Credits
Apr. 30		CJ 22		500.00
May 10		CJ 25	.05	
" 31		CJ 27		500.00
June 9		CJ 31/29	800.00	500.00
" 30		CJ 32	1,000.00	488.16
July 31		CJ 37		500.00
Aug. 6		CJ 38		277.50
" 20		CJ 41/40	5.00	
			68.03	
" 30		CJ 42		500.00
(77)				
Sept.		CJ 48		500.00
Oct. 31		CJ 56/54	53.40	500.00
Nov. 29		CJ 58	2.50	
" "		CJ 61	246.87	
" "		CJ 65/62	31.02	500.00
Dec. 31		CJ 67/66	2.00	50.00
Dec. 24		CJ 70	250.00	
" 31		CJ 71		500.00
" "	To Close		4,798.84	
			9,563.34	9,563.34
1931				
Jan. 1	1930 Ledger			4,798.84
" 27		CJ 3	24.22	
" "		CJ 4	300.00	
" 31		CJ		508.30
Feb. 28		CJ 12		500.00
Mar. 31		CJ 20/18	1.00	500.00
Apr. 6		CJ 22	20.62	
" 11		CJ 23	52.38	
" 30		CJ 27/26	150.00	
			2,101.51	500.00
May 5		CJ 28	100.00	
" 19		CJ 29	60.00	
" 30		CJ 31	400.00	500.00

LEDGER SHEET — PERSONAL — SCOTT LITTON

Account No. 119

Date 1931	Memorandum	Reference	Debits	Credits
June 30		CJ 36/37	91.99	500.00
July 31		CJ 38	3.00	
" 23		CJ 40	66.74	
" 31		CJ 41		500.00
Aug. 10		CJ 43	4.02	
" 31		CJ 44	108.34	
" "		CJ 46	7.26	500.00
Sept. 30		CJ 47	64.52	
" 30		CJ 48	62.61	
" "		CJ 50		500.00
Oct. 27		CJ 52	31.00	
Nov. 5		CJ 54	1,000.00	
" 30		CJ 55	2,500.00	
" 31		CJ 59/56	1,620.71	
			14.10	500.00
Nov. 30		CJ 60	15.00	
" 30		CJ 64	1.07	500.00
(78)				
Dec. 31		CJ 69	107.47	
" "		CJ 70	58.80	
" "		CJ 72/71	500.00	500.00
" "	To close		1,340.78	
			10,807.14	10,807.14
1932				
Jan. 1				1,340.78
" 19		CJ	50.00	
" 30		CJ 4		500.00
Feb. 20		CJ 10/7	1,003.00	500.00
Mar. 29		CJ 11	6.50	
" 31		CJ 14		500.00
Apr. 30		CJ 16/8	9.18	500.00
May 31		CJ 23		500.00
June 30		CJ 24	64.09	
" 30		CJ 26		750.00

LEDGER SHEET — SCOTT LITTON — PERSONAL

Account No. 119

Date 1932	Memorandum	Reference	Debits	Credits
July 30		CJ 28-9	144.18	750.00
Aug. 31		CJ 31-3	11.20	
			3.00	750.00
Aug. 31		CJ 34	66.05	
Sept. 30		CJ 35-6	4.00	
			16.00	
" "		CJ 37-8-9	184.27	72.17
			102.50	750.00
			12.18	
Oct. 31		CJ 42-4	106.64	
			162.53	750.00
" "		CJ 44-5	374.42	
			9.00	
			49.42	
Nov. 30		CJ 47-8-9	792.59	810.29
			3.00	
			22.00	
" 31		CJ 50-1	1.50	750.00
			171.24	
" "		CJ 52	5.50	
Dec. 31		CJ 54-7	7.56	3.60
				4.72
" 31		CJ 56-7	292.44	
(79)			89.01	
Dec. 31		CJ 58	62.21	750.00
" "		CJ 59	260.28	
" "		CJ 60	121.11	
" "	To close		5,771.56	
			9,977.96	9,977.96
1933				
Jan. 1				5,771.56
Jan. 31		CJ 1-2	3.50	
			39.52	
" "		CJ 3-4	287.13	
			249.12	

LEDGER SHEET — SCOTT LITTON — PERSONAL

Account No. 119

Date 1933	Memorandum	Reference	Debits	Credits
Jan. 31		CJ 5-6	200.00	750.00
			70.32	
Feb. 28		CJ 10-11	27.35	
			42.58	750.00
Mar. 31		CJ 14-15	25.20	
			63.81	
" "		CJ 17	283.60	750.00
Apr. 30		CJ 19-0-3	2.63	750.00
			1.00	
			48.75	
May 31		CJ 24-5	250.00	
			5.02	
" "				750.00
" "		CJ 27		26,041.84
June 2	To Judgment for note		33,468.89	
	Fwd.			494.98
(80)	Fwd.			494.98
June 30		CJ 28-0-1	5.40	
			116.00	750.00
July 14		CJ 33-4-5	29.97	
			100.00	750.00
" 31		CJ 35	19.59	
Aug. 31		CJ 37-8	60.00	
			3.00	
" 31		CJ 40	3.50	
Sept. 30		CJ 43-4	100.00	
			300.00	
" "		CJ 46	68.42	
Oct. 31		CJ 49	37.10	
" 31		CJ 50-1-2	400.00	583.33
			175.00	
Nov. 30		CJ 53-4	147.81	.60
" "		CJ 55	53.50	
			22.00	3.60
			291.20	583.33

LEDGER SHEET — SCOTT LITTON — PERSONAL

Account No. 119

Date 1933	Memorandum	Reference	Debits	Credits
Dec. 31		CJ 59	41.01	
			31.00	
" "		CJ 61-3	64.87	583.34
			3.50	
" "		CJ 64	173.62	
" "	To close	CJ	1,502.69	
			3,749.18	3,749.18
1934				
Jan. 1				1,502.69
(81)				
1934				
Jan. 1	1933 Ledger			1,502.69
" 31		CJ 5-6	129.88	583.33
Feb. 28		CJ 9-11	29.21	
			5.85	
" "		CJ 12-13	71.62	583.33
Mar. 31		CJ 18-9	3.00	583.33
" "		CJ 20	1,000.00	
Apr. 30		CJ 21-6	12.05	
			24.00	583.34
" "		CJ 25	50.22	
May 31		CJ 27	100.68	583.33
" "		CJ 30	3,836.01	
June 30		CJ		698.73

LEDGER SHEET — P. H. SMITH — PERSONAL

(82) Account No. 119-A

Date 1928	Memorandum	Reference	Debits	Credits
Jan. 1	1927 Ledger			1,775.20
" 31		CJ 5		416.66
Feb. 29		CJ 12		416.66
Mar. 31		CJ 18		416.66
Apr. 30		CJ 22		416.66
May 31		CJ 25		416.66
June 30		CJ 29		416.66
July 31		CJ 32		416.66
Aug. 31		CJ 35		416.66
Sept. 31		CJ 38		416.66
Oct. 31		CJ 43		416.66
Nov. 30		CJ 49		416.66
Dec. 31		CJ 56		416.74
" "	To Close		6,775.20	
			6,775.20	6,775.20
1929				
Jan. 1	1928 Ledger			6,775.20
" 31		CJ 5		416.66
Feb. 28		CJ 12		416.66
Mar. 30		CJ 17		416.66
Apr. 30		CJ 22		416.66
May 31		CJ 25		416.66
June 30		CJ 28		416.66
July 31		CJ 30	2,000.00	416.66
Aug. 31		CJ 34		416.66
Sept. 30		CJ 38		416.66
Oct. 30		CJ 44		416.66
Nov. 30		CJ 51		416.66
Dec. 31		CJ 57		416.74
" "	To close		9,775.20	
			11,775.20	11,775.20

LEDGER SHEET — P. H. SMITH — PERSONAL

(83) Account No. 119-A

Date 1930	Memorandum	Reference	Debits	Credits
Jan. 1	(1929 Ledger)			9,775.20
Jan. 31		CJ 4	4,000.00	
" "		CJ 6		416.66
Feb. 28		CJ 12		416.66
Mar. 31		CJ 17		416.66
Apr. 30		CJ 22		416.66
May 31		CJ 27		416.66
June 30		CJ 31		416.66
July 31		CJ 37		416.66
Aug. 30		CJ 42		416.66
Sept. 30		CJ 48		416.66
Oct. 31		CJ 56		416.66
Nov. 29		CJ 65		416.66
Dec. 31		CJ 70		416.74
" "	To close		14,375.20	
			14,775.20	14,775.20
1931				
Jan. 1	1930 Ledger			14,375.20
Jan. 31		CJ 6		416.66
Feb. 28		CJ 12		416.66
Mar. 31		CJ 18		416.66
Apr. 30		CJ 25		416.66
May 30		CJ 31		416.66
June 30		CJ 37		416.66
July 31		CJ 41		416.66
Aug. 30		CJ 46		416.66
Sept. 30		CJ 50		416.66
Oct. 31		CJ 57		416.66
Nov. 30		CJ 64		416.66
Dec. 31		CJ 71		416.74
" "	To Close		19,375.20	
			19,375.20	19,375.20

LEDGER SHEET — P. H. SMITH — PERSONAL

(84) Account No. 119-A

Date 1932	Memorandum	Reference	Debits	Credits
Jan. 1	1931 Ledger			19,375.20
" 30		CJ 4		416.66
Feb. 29		CJ 9		416.66
Mar. 31		CJ 14		416.66
Apr. 30		CJ 18		416.66
May 31		CJ 23		416.66
June 30		CJ 26		416.66
July 31		CJ 29		416.66
Aug. 30		CJ 33		416.66
Sept. 30		CJ 38		416.66
Oct. 31		CJ 44		416.66
Nov. 30		CJ 51		416.66
Dec. 31		CJ 58		416.74
" "	To Close		24,375.20	
			24,375.20	24,375.20
1933				
Jan. 1	1932 Ledger			24,375.20
" 31		CJ		416.66
Feb. 28		CJ 14		416.66
Mar. 31		CJ 17		416.66
Apr. 30		CJ 20		416.66
May 31		CJ 27	26,041.84	416.66
June 30		CJ 31		416.66
July 31		CJ 35		416.66
Aug. 31		CJ 41		416.66
Sept. 30		CJ 46		416.66
Oct. 31		CJ 50		416.66
Nov. 30		CJ 57		416.66
Dec. 31		CJ 60	1,000.00	416.74
" "	To Close		2,333.36	
			29,375.20	29,375.20
1934				
Jan. 1				2,333.36

LEDGER SHEET — P. H. SMITH — PERSONAL

(85) Account No. 119-A

Date 1934	Memorandum	Reference	Debits	Credits
Jan. 1	1933 Ledger			2,333.36
" 31		CJ 6		416.66
Feb. 28		CJ 13		416.66
Mar. 31		CJ 19		416.66
Apr. 30		CJ 23-6	1,500.00	416.66
May 31		CJ 30-2	2,500.00	416.66
" 31		CJ 31	416.66	
June 30		CJ 36	52.02	416.66
July		CJ 37	364.64	

LEDGER SHEET — SALARY OF OFFICERS

(86) Account No. 450

Date 1928	Memorandum	Reference	Debits	Credits
Jan. 31		CJ 5	1,416.66	
Feb. 29		CJ 12	1,416.66	
Mar. 31		CJ 18	1,416.66	
Apr. 30		CJ 22	1,416.66	
May 31		CJ 25	916.66	
" "		CJ 26	500.00	
June 30		CJ 29	1,416.66	
July 31		CJ 32	1,416.66	
Aug. 31		CJ 35	1,416.66	
Sept. 29		CJ 38	1,416.66	
Oct. 31		CJ 43	1,416.66	
Nov. 30		CJ 49	1,416.66	
Dec. 31		CJ 56	1,416.74	
" "	To Close	CJ		17,000.00
			17,000.00	17,000.00

LEDGER SHEET — SALARY OF OFFICERS

Account No. 450

Date 1929	Memorandum	Reference	Debits	Credits
Jan. 31		CJ 5	1,416.66	
Feb. 28		CJ 12	1,416.66	
Mar. 30		CJ 17	1,416.66	
Apr. 30		CJ 22	1,416.66	
May 31		CJ 25	1,416.66	
June 30		CJ 28	1,416.66	
July 31		CJ 30	1,416.66	
Aug. 31		CJ 34q	1,416.66	
Sept. 30		CJ 38	1,416.66	
Oct. 31		CJ 44	1,416.66	
Nov. 30		CJ 51	1,416.66	
Dec. 31		CJ 57	1,416.74	
" "	To Close			17,000.00
			17,000.00	17,000.00

(87)

1936				
Jan. 31		CJ 6	1,416.66	
Feb. 28		CJ 12	1,416.66	
Mar. 31		CJ 17	1,416.66	
Apr. 30		CJ 22	1,416.66	
May 31		CJ 27	1,416.66	
June 30		CJ 31	1,416.66	
July 31		CJ 37	1,416.66	
Aug. 30		CJ 42	1,416.66	
Sept. "		CJ 48	1,416.66	
Oct. 31		CJ 56	1,416.66	
Nov. 29		CJ 65	1,416.66	
Dec. 31		CJ 71	1,416.74	
" "	To Close	CJ 74		17,000.00
			17,000.00	17,000.00

LEDGER SHEET — SALARY OF OFFICERS

(88) Account No. 450

Date	Memorandum	Reference	Debits	Credits
1931				
Jan. 31		CJ 6	1,416.66	
Feb. 28		CJ 12	1,416.66	
Mar. 31		CJ 18	1,416.66	
Apr. 30		CJ 25	1,416.66	
May 30		CJ 31	1,416.66	
June 30		CJ 37	1,416.66	
July 31		CJ 41	1,416.66	
Aug. 31		CJ 46	1,416.66	
Sept. 30		CJ 50	1,416.66	
Oct. 31		CJ 57	1,416.66	
Nov. 30		CJ 64	1,416.66	
Dec. 31		CJ 71	1,416.74	
" "	To Close			17,000.00
			17,000.00	17,000.00
1932				
Jan. 30		CJ 4	1,416.66	
Feb. 28		CJ 9	1,416.66	
Mar. 31		CJ 14	1,416.66	
Apr. 30		CJ 18	1,416.66	
May 31		CJ 23	1,416.66	
June 30		CJ 26	1,416.66	
July 30		CJ 29	1,416.66	
Aug. 31		CJ 33	1,416.66	
Sept. 30		CJ 38	1,416.66	
Oct. 31		CJ 44	1,416.66	
Nov. 30		CJ 51	1,416.66	
Dec. 31		CJ 58	1,416.74	
" "	To Close			17,000.00
			17,000.00	17,000.00

LEDGER SHEET — SALARY OF OFFICERS

(89) Account No. 450

Date 1933	Memorandum	Reference	Debits	Credits
Jan. 31		CJ 6	1,416.66	
Feb. 28		CJ 11	1,416.66	
Mar. 31		CJ 17	1,416.66	
Apr. 30		CJ 23	1,416.66	
May 31		CJ 27	1,416.66	
June 30		CJ 31	1,416.66	
July 31		CJ 35	1,416.66	
Aug. 31		CJ 41	666.66	
Sept. 30		CJ 46	666.66	
Oct. 31		CJ 50	1,249.99	
Nov. 30		CJ 57	1,249.99	
Dec. 31		CJ 63	1,250.08	
" "	To Close			15,000.00
			15,000.00	15,000.00

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1934				
Jan. 31		CJ 6	1,249.99	
Feb. 28		CJ 13	1,249.99	
Mar. 31		CJ 19	1,249.99	
Apr. 30		CJ 26	1,250.00	
May 31		CJ 32	1,249.99	
June 30		CJ 36	1,250.00	

DIRECT EXAMINATION OF SCOTT LITTON BY
(91) MR. HENRY ROBERTS: This judgment for $33,468.89 represents the balance which at that time the company owed me and Smith combined.

Account No. 119-A, P. H. Smith, Personal, was his ledger account for salary, and was separate from and in addition to the $250.00 per month which was paid to him on the pay roll. Under date of May 31, 1935, Smith's account No. 119-A was debited with the $26,041.84 which he had assigned to me, and my account No. 119 was credited with the same amount.

The amount of the judgment of $33,468.89, was made up of the $26,041.84, transferred by Smith to me, and a balance of something over $7,000 then due me by the company on my salary account.

The salaries credited to Smith and me on the books of the company were reported to the Government in the Income Tax Reports of the Dixie Splint Coal Company, and I file herewith as Exhibits "Income Tax Returns" certified copies of these returns for the years 1927 to 1934, inclusive. The total amount of the salaries of officers is mentioned in and exhibited at the back of these returns. They require a schedule to be filed showing the amount of salaries to be paid to officers.

In Schedules filed as a part of these returns under the title "Administrative and Selling Expense" or "Administrative Expense", Salaries of Officers are stated as $17,000.00 for the years 1926, 1928, 1930, 1931 and 1932; $15,000.00 for 1933; $7,499.96 for 1934; $11,225.00 for 1925, and $11,000.00 for 1927 and 1929.

In Schedules filed as a part of said returns under the
(92) title "Mine Operating Cost", the Manager's Salary is stated as $6,000.00 for the years 1925, 1927, and 1929.

Also in schedule C, on the face of the returns, Compensation of Officers was stated as $17,000.00 for the years 1929 and 1930, and $11,225.00 for 1925 and $11,000.00 for 1927.

Q20. Do these returns you have filed here reflect the same amount of salaries which are shown by the books of the company and which were taken into consideration in arriving at the balance the company owed you, on

account of your own and the Smith salary which was transferred to you, at the time of the judgment? A. That is correct, and is all represented by proper entries (93) in the ledger showing the various accounts.

Q20. The books show there that Smith's account was transferred to you. Was that regularly assigned to you and settled for between the two of you? A. It was.

RE-CROSS EXAMINATION OF SCOTT LITTON BY MR. HEUSER: P. H. Smith was Secretary of Dixie Splint Coal Company. He was the bookkeeper and you might consider him the custodian of the records.

X6. The major part of your claim against the Dixie Splint Coal Company is made up of the assignment of the claim of P. H. Smith against the company for $26,041.84? A. That is correct.

X7. What, if anything, did you pay P. H. Smith for this claim against the corporation? A. Mr. Smith had been working for me since 1919. Our business association had developed certain interests between us and when I took that assignment from Smith that was practically an adjudgment of our various loans to each other at various times, and business relationships which had grown up between us. Certain considerations were given him for the assignment of that account to me.

X8. Could you detail those various loans and so forth that went to make up that particular items? A. There was no one particular item that entered into the consideration. It was a general cleaning up between he and I of various things that had gone along from time to time.

X9. You mean to say that through personal and busi- (94) ness friendship he assigned that claim to you? A. No, sir, I did not attempt to say that at all.

X10. You wouldn't undertake to itemize the various considerations that entered into that transaction? A. I don't think I could.

X11. There was no writing or written agreement or notes, or anything like that, changed hands? A. There was an assignment given me. I don't know whether I can locate it or not. I imagine it is in some of my papers. I have moved part of my stuff and in looking around for it I didn't locate it, but I think possibly I can find it by looking farther.

The witness later produced and filed the assignment, which was as follows:

ASSIGNMENT

For and in consideration of the sum of One ($1.00) Dollar, cash in hand, and other valuable considerations, I, (P. H. Smith), hereby assign to Scott Litton, his heirs or assigns, the sum of $26,041.84, which amount represents an accumulation of unpaid salary due me by the Dixie Splint Coal Company up to and including April 30th, 1933.

In witness whereof I hereby affix my signature this 10th day of May, 1933.

P. H. SMITH.

Personally appeared before me this date, P. H. Smith, and has acknowledged under oath the foregoing assignment and signature.

Dated at Clinchfield, Virginia, this 10th day of May, 1933.

FRANCES SMITH,
Notary Public.

My commission expires November 1st, 1936.

(95) RE-DIRECT EXAMINATION BY MR. HENRY ROBERTS: The salaries credited to Litton and Smith on the ledger of the Dixie Splint Coal Company were reported to the Government in the Income Tax returns, copies of which have been filed.

BY MR. HEUSER: Mr. Litton, you don't have a certified copy of your personal income tax return for the years from 1927 to 1934, available, do you?

BY THE WITNESS: No, I do not, but every dime in salary that was paid by these other companies was reported.

Q14. Did the Government check you up on that or did they take your word for it? A. Yes, they check you regularly. They also checked the corporation's books every year, and these salaries we have charged up to ourselves and paid to ourselves have been treated by the examiner as reasonable salaries chargeable against the cost of production.

(96) AUGUST 27, 1937.

PRESENT: JOHN ROBERTS, REFEREE, W. T. Bowen, Trustee, C. W. Hamilton, Counsel for the Trustee, A. K. Morison, George M. Warren, J. L. Cantwell, H. E. Widener, M. M. Heuser, Counsel for Mrs. Pepper, Henry Roberts, I. M. Quillen, Counsel for Scott Litton.

SCOTT LITTON, Recalled for further cross examination by Mr. Widener, testified as follows:

There were only three directors of Dixie Splint Coal Company on May 31, 1934, viz: P. H. Smith, Pauline Jones Litton, wife of Scott Litton, and Scott Litton. I believe, testifying from memory, that Mr. Smith owned ten shares of the outstanding capital stock of five hundred shares. The reason for the special meeting for the confession of judgment was that I had been working for the company since it was formed and it owed me certain monies that I felt like was a just and honest debt, and that I would have liked to have had my money if possible to get it. Therefore, I took those steps in order to try to collect the debt. I do not recall the date I took over the Smith account of about $26,000. The records will show what the date of the assignment was. The records will show what the date of the assignment was from Smith to me was. The minutes will show that date. Smith was a small stockholder in the company and I discussed the question with him as to whether he wanted to take judgment in his name or not against the corporation, and he said he didn't want to do it, that he would rather transfer his account to me and let me take judgment in my name.

X9. He did transfer it to you for the purpose of tak-
(97) ing judgment in your name? A. No, sir, he did not.

X10. What purpose did he do it for then? A. Because the company owed him that much money and after he transferred it to me I did take judgment on it.

X11. But I understood you to say a minute ago he didn't want to take judgment in his own name and therefore transferred it to you so you could take judgment? A. He transferred it, and I did take judgment.

There was some other discussion of the account.

I was on the pay roll at that time receiving monthly payments from the corporation. My salary previous to that time was $1,000 per month. I took out over the pay roll $500.00 and had charged on the ledger account $500.00. My salary had been $1,000 a month since January, 1924.

(At this point Mr. Widener introduced the minutes of the corporation.)

There is a minute February 14, 1924, fixing my salary on page 120. The minutes as written fixed my salary at $6,000 per year and the word "increased" is written in ink at that point.

A. In 1924 the corporation was formed, the new corporation was formed. Up to that time Mr. Long, who was then a partner in the business, had been receiving a like salary to myself. I negotiated and purchased Mr. Long's interest in the corporation, and when I did that, I increased my salary from $6,000 to $12,000 per year, and that was an error in the minutes, and I presume it was corrected accordingly rather than holding a new Directors' meeting. In the old corporation I had received $6,000, and when I purchased all of it, I received the increase in salary of that amount.

X30. So that was a correction of the minutes rather (98) than having another directors' meeting? A. I don't recall. I was at that time drawing a salary of $500.00, chargeable over the pay roll as General Manager, and the salary was paid to me on that basis—$500.00 over the pay roll and $500.00 charged on the ledger as an executive salary.

X31. You don't know how it happened? A. I do know how it happened. That is my explanation.

When the judgment for $33,000 was confessed the company owed certain labor claims and certain other open accounts. The labor claims were all paid.

X36. And the open accounts were paid. Was there any judgment outstanding against the Dixie Splint Coal Company at the time of the confession of judgment? A. I think the judgment obtained by Mrs. Pepper was possibly in Court. I don't recall at this time whether she obtained her judgment prior to the confession of judgment or afterwards. The record will show that.

(At this point Mr. Widener introduced the Cash Journal.)

The journal shows that Mr. Smith received $250.00 per month over the pay roll. The journal shows cash disbursements and the ledger is on an accrual basis. Mr. Smith was paid a salary, an executive salary, that was charged upon the ledger, then he was paid an additional salary as bookkeeper, which was charged over the pay roll. Now whether or not those pay roll salaries are contained on the ledger I don't think they are until payment is made and then journalized. I don't know.

(99) X58. I am asking you as a matter of fact, regardless of the books, don't you know whether or not he received $500.00 or $750.00 per month? A. As a matter of fact I think the books show $500.00 per month salary on the ledger and on the payroll $250.00 per month.

Smith was the bookkeeper. He had other duties than bookkeeping.

X61. Do you mean to say with ten shares of stock in the corporation, which only had 500 shares of stock, that he was to get $250.00 to be paid in cash and $500.00 to be set up on the books? A. That is exactly the facts. The records speak for themselves.

X62. I believe the ledger shows $416.66 per month? A. I think that is correct, making a total of $5,000 per year.

X63. Isn't this the fact that that was put on the ledger purely as a matter of bookkeeping for income tax purposes? A. The Federal Government allows and recognizes as a legitimate charge against operation reasonable salaries to executives.

X64. Isn't that why that was set up on the ledger because the Government would allow it on your income tax returns? A. The Government did allow it.

X65. And isn't that why it was put on the books, and for that purpose only? There is no complaint about it, but isn't that why it was put on the books, just for income tax purposes? A. No, I wouldn't say that was the only reason it was put on the books.

X66. That was one of the reasons, wasn't it? A. It was put on as a legitimate charge against operation.

(100) X67. But except for income tax purposes, that would not have been put on the ledger at all, would it?

BY MR. ROBERTS: We object to the hypothetical question.

BY MR. WIDENER: It is not a hypothetical question.

X68. Except for that one purpose it wouldn't have been put on the ledger at all, would it? A. You are asking me a question now that is a hypothetical question.

X69. Do you refuse to answer because it is a hypothetical question? A. I wouldn't say I refused to answer at all. I say the Federal Government did recognize it as a legitimate charge against the operating expense. It was put in as a charge against the operation.

X70. Why wasn't it paid, or any part of it? A. If I had called on the company for all the salary it owed me, possibly the company couldn't have operated. But during good times, when the corporation was prosperous, those salaries were paid. At other times, when the coal business was in bad condition, and the company possibly losing money, those demands were not enforced on the corporation.

X71. Now then, why did you collect your salary, all except one-half a year's, and why did Smith allow his to run in arrears to the amount of $26,000 over the same period? A. I think that question was answered just

a moment ago by explaining the different periods of poverty and prosperity.

X74. But Smith got less than you dfd. He got $250.-00 a month and you got $12,000 a year, except for the last half year. Why did he get in arrears $26,000 while yours was just a half a year in arrears—why did the corpora-(101) tion treat him like that? A. I don't know that. That is in the form of argument rather than a question. You ask me why the corporation did do certain things or why did Smith do certain things.

X84. What was the difference between the character of work that Smith did for which he got $250.00 a month and his work as an executive, for which there was set up $416.66 per month—the $250.00 being on the pay roll account and the $416.66 being set up on the ledger. What was the difference in the work? A. He was employed by the corporation and he did whatever duties were required of him. He gave all his time to the corporation.

We had two employees in the office, Smith and somebody else. I was President of the company and principal and controlling stockholder.

At the sale of the property of Dixie Splint Coal Company on June 14, 1934, I bought it in as agent of the Dixie Coal Company for $3200.00. The charter was issued to Dixie Beaver Coal Company. The incorporators were E. P. Litton, P. H. Smith and A. C. Jones. The incorporators paid the $3200.00. I did not pay a dime of it.

X112. Who eventually got the stock that was issued for the Dixie Splint property that was sold at the sale? A. Well, I don't recall whether or not when the company was incorporated a certain amount of money was placed in the treasury and this bought, or whether or not the stock was issued for it. I don't recall as to that.

I might be mistaken as I do not have the record before me, but at the present time that stock is owned thirty (102) shares I believe by myself and the remainder by E. P. Litton. He is my nephew. I treat him as my son. He is twenty-seven or twenty-eight years old. The di-

rectors now are Scott Litton, E. P. Litton, and J. P. Wolfe, who owns one share, I believe. The outstanding stock is 250 shares. The property sold at that execution sale is in the possession of Dixie Beaver Coal Company at Clinchfield and at Cranes Nest in Wise County.

As to the value of the property there were several bidders at the sale, and it was knocked down to the high bidder at $3200.00 and something. The other bidders dropped out and wouldn't go any higher. I don't remember whether that property was carried at any value on the books of the Dixie Splint Coal Company.

Asked if he had received a recent offer of $18,000 for the property, the witness replied:

Well, I don't consider that I ever received a firm offer that was satisfactory to me for the equipment. I don't know what it is worth. I would hesitate to give you an opinion about equipment that somebody else bought and owned, added to and repaired, and that was thrown in as a whole with other equipment of the same nature and kind. The following ledger sheet of Dixie Splint Coal Company, relating to plant equipment, was introduced:

EXHIBIT—LEDGER SHEET—PLANT EQUIPMENT

(103) Account No. 79.

Date 1931	Memorandum	Reference	Debits	Credits
Jan. 1	1930 Ledger		$5,351.37	
Jan. 31		CJ 5	3,234.18	
1932				
Dec. 31		CJ 56	130.00	
" "	To Close			$8,715.55
			$8,715.55	$8,715.55

Date 1933	Memorandum	Reference	Debits	Credits
Jan. 1			$8,715.55	
Mar. 31		CJ 18	550.00	
June 30		CJ 30	225.00	
Dec. 31	To Close			$9,490.55
			$9,490.55	$9,490.55
1934				
Jan. 1			$9,490.55	

X150. I notice this minute on page 140 referring to (104) your demand that judgment be confessed states that judgment in that amount be confessed by the corporation in your favor to avoid others costs. What did you mean by other costs? A. Well, I meant by that if we had gone in Court and brought a suit to confess that judgment it would merely mean we would have to pay certain expenses, and as all the parties interested recognized it as being a just and legal debt we had no hesitancy in taking that step in order to bring it to a conclusion.

X151. You in fact were confessing judgment in your own favor? A. I don't know whether you would put that construction on it or not.

X152. But for the Pepper litigation pending at that time and the attempt to collect her debt would you have confessed judgment at all? A. I dare say not if it was not for the effect of the Pepper litigation which practically was the main reason for the busting of the company by their attaching all accounts receivable, by attaching the retail coal yard in Bristol, by attaching the plant equipment, in fact every item that they could lay their hands on, but for that fact the corporation might have been in existence today.

X153. So you confessed judgment in your own favor in order to defeat her debt? A. No, I confessed judgment in that case, or the directors authorized it because the corporation was being attacked, because it owed me

a just and legal debt, and because I thought I had as much right as anyone else to protect my interest as they had to protect theirs, and that was my reason.

X154. And in confessing the judgment you were pro-
(105) tecting in fact, and that was your purpose, the corporation?

BY MR. ROBERTS: Objected to, because under the law of Virginia a creditor, if he desires to do so, may prefer one creditor over another.

A. No, in confessing judgment I was taking what steps I felt I was justified in taking to protect my own interest.

X155. And your own interest was your company's? A. My own interest was the amount of money the corporation owed me because at that time all of its assets practically had been garnisheed or levied on, which, in a sense, forced the corporation out of business.

I think the record will show Mrs. Pepper had judgment against the company when my judgment was confessed. I say I think the record will show that. I don't want to become confused as to dates.

X167. Now then, you stated that the main reason that judgment was confessed was because Mrs. Pepper was attaching the property of the company and garnisheeing it, and tying up your bank accounts, and yet she didn't obtain judgment against you until February, 1934—and you confessed judgment in June, 1933? A. Did you say at the time judgment was confessed or at the time the property was sold? That is what I understood you had reference to.

X169. I am asking about the time you confessed judgment. A. Well you were discussing the sale of the property, and enforcing the execution and so forth.

X170. I understood you, and the record shows whether I am right or wrong, that you confessed that judgment to protect your own interest in the company,
(106) and your own interest, because you thought you had a legal right to, and because Mrs. Pepper was tying up your bank accounts and attaching your property. A. That was my reason for the company going into bankruptcy. The Pepper litigation both against the corpora-

tion and against me individually had been going on some three or four years at the time of the confession of judgment.

X171. Mr. Litton, I don't want you to misunderstand me. That is the first time that bankruptcy, so far as I know, has been mentioned. I have never talked about bankruptcy. I have talked about the confession of judgment.

BY MR. ROBERTS: You did talk about the value of the property at the sale, and you emphasized that that was the time you had in your mind, and that was the thing he was answering you on.

X172. I understand. Now then, you tell me why you did confess judgment?

BY THE REFEREE: Haven't you gone over that about three times?

BY MR. WIDENER: I thought he misunderstood me.

A. You asked questions one minute about one phase of the situation and then you immediately switched over to another I think with a view of, I suppose, just confusing me as to what you are talking about. You have confused the sale of the property and the assets, and the value of the property with the time of the confession of judgment. You are asking now why the judgment was confessed?

X173. The record will show what confusion exists.

A. At the time I made demands upon the company for (107) the money the company owed me, I felt I had a legal right to protect my legal rights in the company as any other person who was suing or who had at that time received judgment, or otherwise. For that reason judgment was confessed, because I treated it just as an honest debt, and everyone else involved did likewise. Does that answer your question?

X174. Was there any debt of the Dixie Splint Coal Company except Mrs. Pepper's claim that was not paid in full? A. I don't believe there was a dime of outstanding indebtedness against the Company that wasn't paid except the judgment we are now fighting about.

X175. Mrs. Pepper's? A. Yes. Because in order to operate the company during that period of time I had to guarantee personally a number of accounts before they could be made.

Referring to the payments to me in Account No. 119 in 1934 I imagine part of that money was taken out to fight the law suit which had been going on for three or four years. I don't know what those items were. Proper records were made showing all the money I withdrew from the corporation.

X182. I notice in 1934, Smith on April 30 got $1500; on May 31, $2,500 and also on May 31 $416.66; on June 30, $52.02, and in July $364.64. He was not nursing the corporation along, was he? A. I consider that no money was removed from the corporation that would endanger its financial standing to the detriment of any of its creditors at that time.

X191. Wasn't the whole plan and scheme of yourself and the corporation which you dominated to defeat the (108) Pepper claim or judgment at whatever hazard? A. The corporation had been in business since 1924. There were certain obligations which I had made for the corporation which I felt I was personally liable for, and I always tried not to make any debts for the corporation except the debts that could be paid, and we never had treated the Pepper claim as a proper claim or one that was just and honest, up until the time the Court said we should. We never had an account on our books at all showing we owed the Peppers a dime. We were just operating the corporation according to the policies that had been adopted previous to that time, and to pay its just and honest debts and go ahead. As for any scheme or plan to defeat Mrs. Pepper's judgment, we were merely fighting it like a person will fight any other law suit, with everything we had.

X193. It was under that resolution of June 16, 1934, wasn't it, that you put the company into bankruptcy voluntarily? A. Previous to the time of this resolution, and previous to the sale of the property, I had endeavored to go ahead and see if I could work the situation out and pay the debts of the corporation, including the Pepper judgment, but they insisted on attaching the

accounts receivable, the coal yard in Bristol, and had it sold, the bank account, and particularly our main accounts receivable, the account of the Norfolk and Southern Railway Company in Norfolk, and through their action the company had been tied up and it could not operate. It was during part of that period or previous to that period when this was going on that some of the men had become alarmed about their pay, and rumors were going around that the corporation was going to be closed out and I was going to be broke, and that I was being sued for a large amount, and I told some of the men (109) at that time, or possibly all of them, that I would guarantee personally any wages that the corporation didn't pay. I guaranteed personally the scrip orders to the store for any amounts over and above which the corporation didn't pay, and certain amounts that were purchased by the corporation from wholesale houses, and so forth, with whom I had been dealing for years, was purchased more or less on my past record with them. And it was certainly my intention, the corporation being in the financial circumstances like it was, that if I made debts and obligations for the corporation knowing its circumstances, that I would be then personally liable myself for those obligations, and that, among other things, was one of the reasons why I paid off certain claims to the wholesale house, and so forth, and paid the men dollar for dollar all of the wages that was beyond the period that would be taken care of by the Bankrupt Court, and there was no other course for the corporation to take, in my opinion, but to be put in bankruptcy, and let its affairs be settled up by a Trustee. That, Mr. Widener, is the answer as best I can give it to your question. I think that I acted under the authority of that resolution at the time the corporation was thrown into bankruptcy.

RE-DIRECT EXAMINATION BY MR. HENRY ROBERTS: We had been shipping coal to Bristol to the yard there, and the Southern Railway Company had extended credit there to the coal yard through Mr. Jones, and I felt like that was certainly an obligation which I was personally liable for under the circumstances, that they had extended the credit to him and I just felt the obligation should be paid.

The bank account of Dixie Splint Coal Company in the (110) Dominion National Bank was garnisheed by Mrs. Pepper. We could not operate. We were closed up. The large account of $6,000 or $7,000 due Dixie Splint Coal Company by the Norfolk-Southern Railway Company was also garnisheed on an execution on the Pepper judgment. I thought it was only proper to avoid litigation in four or five courts that the company be put in bankruptcy and let it all be cleared up through one source. Also the lease from Clinchfield Coal Corporation under which Dixie Splint Coal Company was operating had been cancelled. The notice of cancellation of this lease is dated June 2, 1934, and states that at the expiration of thirty days the lessor intends to cancel and annul the lease agreement in its entirety and take possession of the premises. The corporation was involved and busted and there wasn't any possible chance for it to operate.

At this point the minutes of June 16, 1934, of a called meeting, held for the purpose of, among other things, considering the notice from the Clinchfield Coal Corporation of the cancellation of its lease to Dixie Splint Coal Company, was read, and upon consideration of the notice it was recited:

"After full and complete discussion of the affairs of the corporation, and owing to the fact that certain judgments have been secured against Dixie Splint Coal Company, and that the company's bank account, principal portion of cash and accounts receivable have been attached under these judgments, and sale of its machinery and equipment having been made, the corporation, therefore, is unable to carry out its obligation under its lease agreement dated January 1st, 1931, as above referred to, and in fact through the actions of its various creditors the corporation is unable to function."

Then it was resolved that the officers of the company (111) execute a release deed to the Clinchfield Coal Corporation, which was done, and copy of the release deed incorporated in the minutes.

Continuing the witness said: The most difficult duty I had to perform was to sell enough coal at a profit and

have enough money to pay off on pay day. I sold the coal. Possibly one half of my time was consumed with that phase of the work. When I was away for any purpose Smith was in charge of the work while I was gone. He had been working for me a long time and did practically any duties I required of him or asked him to do. His duties were not confined to any one particular phase. He kept the records of course because he is an experienced bookkeeper. In my absence he decided and handled any questions that came up.

Q29. Now then, you were asked at length by Mr. Widener whether or not the confession of judgment in your favor by the Dixie Splint Coal Company was part of a scheme to defraud Mrs. Pepper, or something like that. What was your answer to that?

BY MR. WIDENER: We object. I didn't state it was to defraud Mrs. Pepper. I said to defeat her judgment or claim.

BY MR. ROBERTS: All right then, defeat.

BY THE REFEREE: Do you allege fraud in this matter? Is there any allegation of fraud in this matter? By this objection do you mean you don't allege any fraud?

BY MR. WIDENER: I object to him misquoting me in the question.

Q30. I will change it then, "to defeat Mrs. Pepper". As I understood you, you were protecting your own interest? A. I felt I had that right, yes.

(112) Q31. Were you advised by counsel that you had a right to have that judgment confessed? A. I was.

Q34. The Pepper suit at Bristol was against the Dixie Splint Coal Company as a corporation and Scott Litton, et al., individually and otherwise, was it not? A. That is my understanding.

Q35. Mrs. Pepper was asking for judgment against you individually for something like $125,000 in that lawsuit, was she not? A. Yes, sir.

Q36. She finally got judgment after the case came back from the Supreme Court of Virginia for about

$4300.00, did she not? A. I believe that is the amount, near that.

Q37. Did you pay that off? A. Yes, I have paid that.

I also paid her judgment against me for costs of about $500.00 at the same time. I borrowed the money with which to pay the judgments. I am rather hard put to do the things I am trying to do at the present time.

The decree referred to was introduced, and is as follows:

VIRGINIA: At a Corporation Court of the City of Bristol, on the 8th day of August in the year of our Lord, Nineteen Hundred and Thirty-Six:

Present: Hon. Floyd H. Roberts, Judge.

Jean McNeil Pepper, Executrix of A. P. Pepper, and in her own right,

v.

Dixie Splint Coal Company, et al.

This cause was further heard on August 3rd, 1936, on (113) the papers formerly read and orders entered, upon complainant's replication to Scott Litton's amended and Supplemental Answers this day filed by complainant over the objections of the defendants, and particularly before a jury duly summoned and impaneled as follows: Chas. E. Ide, J. P. Moorman, Armand Hecht, M. H. Garrett, Herbert Dishner, Geo. D. Helms and W. W. Fillinger, who were duly sworn "You shall diligently inquire of damages in the suit between Jean McNeil Pepper, Executrix, Complainant, and Dixie Splint Coal Company (the first corporation), Pauline Jones Litton, Ida L. Farris, C. P. Jones, Scott Litton, Lucy G. Long, Charlotte L. Stewart and Mildred Wolfe, Defendants, and a true verdict give according to the evidence, so help you God."

Thereupon, counsel made opening statements and the

evidence being heard in part, the jury was adjourned from day to day until all the evidence offered by both sides, consisting of testimony heard ore tenus, depositions, documents and exhibits, was fully heard on August 7th—the trial consuming five days—when the evidence was completed, and thereupon, after receiving instructions from the Court and hearing the argument of counsel, the jury retired to their room to consider of a verdict, and after sometime returned into Court, having found the following verdict;

"We, the Jury, find for the complainant and assess the damages at $4282.94.

CHAS. E. IDE, Foreman."

Thereupon, it being past time for adjournment for the day, the cause was left open until today, August 8th, for motions, if any. Thereupon, Complainant by counsel (114) dictated their motion into the record and stating the grounds thereof to set aside the verdict of the jury, and to render judgment.

Thereupon, Defendants by counsel, dictated their motion into the record, stating the grounds thereof to set aside the verdict of the jury, and to award a new trial.

Whereupon, after argument of counsel, the Court doth deny both motions, and doth decree that complainant, Jean McNeil Pepper, Executrix and in her own right, recover of Dixie Splint Coal Company (the first corporation), Pauline Jones Litton, Ida L. Farris, C. P. Jones, Scott Litton, Lucy G. Long, Charlotte L. Stewart and Mildred Wolfe the sum of $4,282.94, with 6% interest thereon until paid, from August 7, 1936, and her reasonable costs in this behalf expended, for which execution may issue. All parties on each side except.

And this cause is stricken from the docket.

Complainant expressing a desire to appeal, upon motion of complainant by counsel, it is ordered that no execution issue until after 15 days notice to the defend-

ants or their counsel in order to give them opportunity to pay said judgment and costs without additional costs.

A copy Teste:

DAN DRINKARD, Clerk.

(115) Q42. The printed record in the mandamus case here shows that you had loaned George H. Pepper considerable money about 1923. Is it or not a fact that you loaned him that money? A. Yes, sir.

Q43. Did he ever pay it back? A. No, sir.

Q44. The amended answer in the mandamus case shows you advanced George Pepper $1500.00 against the royalties in about 1925 or 1926. Is that a fact? A. That is a fact.

Q46. Did A. P. Pepper come over there—What did A. P. Pepper have to do with that advance? A. He advised me to make this advance as advance royalties. At that time they claimed no minimum royalty and I made that advance to George H. Pepper with his approval.

Q47. With whose approval? A. With A. Pierce Pepper's approval, and deducted it from the royalty on coal mined thereafter.

Q48. In other words, it was an advance? A. On coal that hadn't been mined and it was deducted from the next reports we made to them.

Q49. I believe that same answer shows that A. P. Pepper paid you several checks for coal at Bristol there during the period after the Dixie Splint Coal Company abandoned the mine. Did he or not do that? A. He never considered that we owed them a dime in royalties, and neither did we, until they worked this law suit up against us.

(Note: Counsel for Mrs. Pepper objected to the (116) foregoing questions and answers on the ground they were immaterial, and that the matter had been concluded by judgment, and that the answers sought were not the best evidence. Overruled. Exception.)

RE-CROSS EXAMINATION BY MR. WIDENER: The witness stated, that under date of June 22, 1934 Dixie Beaver Coal Company secured a lease from Clinch-

field Coal Corporation on certain property on Dumps Creek, part of which I think had formerly been leased to Dixie Splint Coal Company.

Mr. Widener introduced a copy of the lease of June 22, 1934, which covered the same seam of coal and the area on which the mining plant was located in the former lease to Dixie Splint Coal Company as well as a large part of the area covered by the former lease, the area in the lease to Dixie Beaver Coal Company being somewhat different from the area covered by the lease to Dixie Splint Coal Company.

SEPTEMBER 10, 1937.

PRESENT: John Roberts, Referee. W. T. Bowen, (117) Trustee; C. W. Hamilton, Counsel for the Trustee. Geo. M. Warren, H. E. Widener, M. M. Heuser, Counsel for Mrs. Pepper. Henry Roberts, M. M. Long and I. M. Quillen, Counsel for Scott Litton.

Mr. Widener introduced as an exhibit a certified copy of the statement as to issue of stock by Dixie Beaver Coal Company filed with the State Corporation Commission and its Order thereon of May 31, 1935, which statement shows that the company was incorporated June 21, 1934, charter amended April 22, 1935; that it had issued for cash 48.65 shares of stock for $4864.64, and proposed to issue 201.35 shares of the par value of $20,135.36 for the following equipment:

"Consisting of 1 Morrow Jr. Shaker Screen Tipple and equipment; 1 Westinghouse M. G. Set with instruments and equipment; 1 Jeffrey 10 ton haulage locomotive—1 Jeffrey Gathering locomotive and rps. 1 G. E. Five ton Gathering locomotive and rps. 1 Five ton locomotive frame. 1 Lot 75 wood and steel mine cars—also lot of cars in bad repair, car irons. 2 Mine gathering pumps and motors, including all pipe connections and fittings used in and around the mine. 1 Lot 7300 ft. 4/0 and 2500 ft. copper trolley and transmission wire, including hangers and fastenings, connections and switches, (more or less). 1 Goodman shortwall cutting machine and repairs—5500 lineal feet 16# Steel rails

with switches and fastenings—6850 lineal feet 25# steel rails with switches and ties fastenings etc—4600 lineal feet 45# and 50# steel rails with switches, angles, fastenings, etc. 1 sand dry dryer—1 Iron safe—1 adding machine—1 small stove—3 desks—2 typewriters 1 lot (118) miscellaneous office supplies and equipment. Also all miscellaneous supplies and equipment used or contained in or around the mine now being operated by Dixie Beaver Coal Company, Incorporated."

The resolution of the stockholders and directors fixing said value of said property is incorporated in the statement. The resolution recites that the said property "was formerly owned by Dixie Splint Coal Company and now owned by Scott Litton."

It was reported by counsel for Mrs. Pepper that the auditor employed by them to go over the books of the bankrupt had not been able to complete the work he had been requested to do, and rather than continue the hearing it was agreed that counsel for Mrs. Pepper could use the auditor's work in their brief, and that opposing counsel would have an opportunity to reply thereto. The auditor was C. D. Richards, Certified Public Accountant. The auditor's work sheets were filed with the brief for Mrs. Pepper before the District Judge and are among the papers in the court file.

The foregoing narrative is hereby approved.

(Signed) JOHN PAUL,
U. S. District Judge.

August 8, 1938.

REFEREE'S ORDER OF FEBRUARY 4, 1938.

(119) (Filed February 4, 1938)

Before John Roberts, Referee in Bankruptcy on the 4th day of February, 1938.

On April 21, 1937, Honorable John Paul, Judge, entered an order in the above matter, "inter alia", as follows:-

"It is ORDERED that the said order entered by the Referee on February 22, 1937, be, and the same is hereby, reversed and set aside.

"And it is further ORDERED that the subject matter of said order of February 22, 1937, be further inquired into and determined by the Referee in accordance with the views expressed in said memorandum of the Court of this date and that further proceedings in this cause be had in conformity with the views therein expressed."

The memorandum of the Court referred to in the above contains, "inter alia", the following:

"The order of the Referee of February 22, 1937, will be reversed in so far as any of its provisions are based upon the supposed validity of the Litton judgment. There has been no adjudication of the validity of this judgment by the Referee and no formal adjudication of the exceptions filed in the bankruptcy court to the allowance of the Litton claim. It seems generally conceded that the Litton judgment is void, but I think this should be definitely determined. The proceedings will be remanded to the Referee with instructions to pass upon the status of the Litton claim from the standpoint of whether or not the judgment is void. If it is determined that the judgment is void and if Litton shall then desire to pursue this claim as a general creditor, then inquiry should be made into its validity as a general debt. In directing this course, the court does not commit itself as to any action it may hereafter take in allowing or disallowing the claim. That action must wait upon a full disclosure of the facts regarding it."

There are now four questions pending before the (120) Referee which are as follows:

FIRST. Whether or not the Litton judgment is void.

SECOND. If the judgment is found to be void, whether or not the claim asserted under the judgment is a valid general debt.

THIRD. Motion of counsel for Mrs. Pepper to have

appraised the property sold by the Sheriff of Russell County, Virginia, under Litton's execution.

FOURTH. Original exception to the allowance of the claim of Mrs. Pepper and the amended conditional exceptions to said claim.

FIRST

The Referee holds that there was not sufficient compliance with the Virginia Statutes 6130 and 6130a with reference to the confession of judgments to make the Scott Litton judgment at issue in this matter a valid judgment. While there was an attempt to comply with the Virginia Statutes, the minutes of the Directors meeting of May 31, 1937, is not in compliance with the Statute. That part of the minutes of that meeting applicable is as follows:

"The object of this meeting was to consider a demand made upon the company by Scott Litton for certain monies which the corporation was then due him in the amount of $33,468.89. Mr. Litton stated to the meeting that some disposition of the account must be made, therefore, it was moved by P. H. Smith and seconded by Pauline Jones Litton that judgment in that amount be confessed by the corporation in favor of Scott Litton to avoid other costs, etc."

Nor can the ratification, as set forth in the minutes of December 15, 1933, be construed as authority to make the alleged judgment a valid judgment. The minutes of that meeting, as set forth in the Minute Book on page 141 thereof, are as follows:

"At the annual meeting of the stockholders of the Dixie Splint Coal Company, Incorporated, held at its principal office at Clinchfield, Virginia, December 15th, 1933.

"The meeting was called to order by Scott Litton, acting as Chairman, and P. H. Smith, acting as Secretary. On roll call it was found that all stockholders, representing the entire outstanding stock of the company, (121) were present. Minutes of the previous meeting

was read and also the minutes recorded of the Directors meeting were read and approved. Waiver of notice was accepted by all stockholders.

"Scott Litton, President of the Company made a report as to the future prospects of the Company, stating therein that he had agreed to accept a salary reduction of $2,000.00 a year, and stated that should the company secure sufficient business to justify the raising of this salary that he would expect it to be raised at some future date.

"The question of indebtedness to Scott Litton was discussed and he informed the stockholders that he felt like he should not be asked to carry this indebtedness indefinitely and indicated his desire to have some action taken on the question of payments on the judgment which the corporation had confessed in his favor in June, 1933, which action of the directors is hereby ratified and confirmed by the stockholders. A lengthy discussion of future prospects of the company was gone into by all stockholders, and it was decided to try further operations, with the view of gaining back some of the losses of the company over the past two or three years.

"The next in order was the election of directors, and upon motion duly made and seconded, the previous directors were re-elected to serve for a period of twelve months, namely; Scott Litton, P. H. Smith, and Pauline Jones Litton.

"There being no further business before the meeting and upon motion the meeting adjourned."

SCOTT LITTON,
Chairman.

P. H. SMITH,
Secretary.

These actions of the directors and the stockholders would probably be sufficient to estop the corporation from questioning the judgment and doubtless make the judgment valid, in so far as the corporation itself is concerned.

The Referee cites no authority for his view with reference to this judgment. Counsel for both Mrs. Pepper and Scott Litton have cited numerous authorities and some others might be cited by each, as there do appear to be authorities in some jurisdictions that tend to hold that a confessed judgment by a corporation is held to (122) be valid even though no specific officer of the Corporation has been designated by the directors to confess the judgment.

Perhaps the foregoing is as far as the Referee should go under the Court's order, but as it is necessary for the Referee to indirectly pass on the question of estoppel by reason of a motion made at the hearing and hereinafter referred to, he again holds that Mrs. Pepper is estopped to deny the validity of the judgment. This will be more completely set out hereinbelow.

The exceptions by Mrs. Jean McNeil Pepper to Scott Litton's claim were filed on December 18, 1934, and they are here set forth as follows:

"(1) That the validity of said judgment has been questioned by the Trustees of said bankrupt corporation, and is now pending; and

"(2) That should it be determined that the said alleged claim is not a prior or preferred lien claim, the same does not constitute a common claim, since the amount claimed under said judgment was never due or owing to the said Scott Litton."

In addition to the above, at page 119 of the transcript of hearing before the Referee, Mr. Heuser asked to amend the objection as follows:

"We would like to make a motion to amend the objection on which this evidence is being taken. I don't have the objection before me, but as I recall it, it is something like this: That the claim is objected to as a judgment on the ground that it had been questioned by the trustee in bankruptcy, or litigation concerning it was pending. In order to make the objection more timely, we would like for it to be that the claim is objected to as a secured claim on the ground that the pur-

ported judgment on which it is based is wholly and utterly void upon its face."

It is here noted that the Circuit Court of Russell County and the Supreme Court of Appeals of Virginia had held that Mrs. Pepper was estopped to deny the validity of the Litton judgment. See — Trustee of Dixie Splint Coal Company against Scott Litton 167 Va. 263.

SECOND

On the question of the validity of the Scott Litton (123) claim as a general debt or claim. The proof with reference to this last exception comes almost entirely from Mr. Litton under cross examination and the books of the company. It appears that the item of $33,468.89 is made up of past due salaries due to Scott Litton and P. H. Smith. $26,041.84 of the total amount of the judgment was transferred from P. H. Smith to Scott Litton on May 31, 1933. This appears on page 41 of the transcript from the account of P. H. Smith and also on page 37, on the account of Scott Litton. The balance of the sum of $7,427.05 appears to have been salary due Scott Litton on the date of the judgment on June 2, 1933; and it further appears that in addition to that amount, the company was indebted to Scott Litton in the sum of $494.98 at the time that judgment was confessed and which was not included in the judgment. The record shows that a salary of $5,000.00 per year was credited on the books to Mr. Smith and that this had been carried forward from year to year until the total amount of the same was $26,041.84, as of April 30, 1933. Only two or three debits were made against this salary from January 1, 1928, to May 31, 1933, and I do not recall that any explanation was made of these debits. It appears that several debits were made against this ledger salary after May 31, 1933. The record in the case also shows that Mr. Smith drew another salary that was carried on the pay-roll and was not entered on the ledger. The written assignment of this item of $26,041.84 from P. H. Smith to Scott Litton bears date on the 10th day of May, 1933, and is attached to the transcript of the record at the back thereof, and it shows that it was for salary up to and including April 30, 1933.

In support of the genuineness of these salary items, certified copies of the income tax returns, as made to the United States collector, of Dixie Splint Coal Company for several years are filed with the evidence and they show that these officers' salaries were allowed by the government authorities in calculating the income tax of the Dixie Splint Coal Company. It therefore appears that the company was indebted to Mr. Litton in the amount of the claim as asserted and in the amount as set forth in the judgment, and the Referee so holds.

In addition to the above claim the following general (124) claims were allowed in favor of Scott Litton:

1.	As Assignee of Southern Railroad Co.	$ 64.23
2.	As Assignee of Various general labor claims	55.59
3.	Salary claim asserted as prior labor claim denied as such and allowed as general claim	600.00

In addition to above counsel inquired about a general claim in the sum of $922.20 for salary accrued more than 90 days before the bankruptcy, but the Referee has no record of such claim having been filed within six months period.

THIRD

At the hearing on August 23, 1937, counsel for Mrs. Pepper made a motion which appears on page F of the transcript, as follows:

"BY MR. HEUSER:

"At this point I would like to make this motion to Court:

"Jean McNeil Pepper, creditor, now moves the Court to appoint three disinterested and qualified persons to appraise the tangible property of the bankrupt that was purportedly sold under levy of an execution from the void judgment against the bankrupt in favor of Scott Litton, on June 14, 1934; and to direct such apprais-

ers to ascertain the present value of said property and the reasonable monthly or annual rental value thereof; and to report to the Court what they do under such direction as soon as may be.

"This 23rd day of August, 1937.

"This motion is made pursuant to the provisions of Section 70-B of the Bankruptcy Act, which is USCA Title 11, Section 110. (Note: Said Section was read to the Court.)"

And on page G. and H. as follows:

"BY MR. HEUSER:

"I would like to make an amendment to this motion; That the appraisers be directed to ascertain, if they can, the fair market value of the tangible property on June 14, 1934, as well as its present market value."

This was an informal motion. The record shows exceptions, arguments, etc. by different counsel. The Referee did not pass on the motion and stated that he would not pass on any of the motions or questions until the whole matter was closed before him. This motion is referred to hereinabove, and the Referee now denies the motion and he assigns as the chief reason for de-
(125) nying the motion that Mrs. Pepper is estopped to deny the validity of the Litton judgment and the sale thereunder. This question was submitted to the Circuit Court of Russell County, Virginia, and on the motion of Mrs. Pepper, as clearly appears in the record of this case. The Circuit Court of Russell County held that she was estopped to deny the validity of the judgment and the Supreme Court of Appeals of Virginia affirmed that decision as set forth above. The Referee holds that Mrs. Pepper could not come into the Circuit Court of Russell County and file an answer and agree that a part of the funds held by the Sheriff could be paid of Clinchfield Coal Corporation and by the "saving clause" or paragraph that she inserted in her answer void the estoppel. She has allowed the parties to be placed in a status that thereafter could not be restored. At that

time the sale had just been made and the parties at interest could have been placed in their former status without loss or serious inconvenience to anyone. This motion is made more than three years after the sale had been consummated, and she would now be estopped by laches, as well as her action in the suit.

The Supreme Court of Appeals of Virginia, expressly passed on this point in its opinion in the above case. I quote from the opinion on page 266 and 267 as follows:

"When seeking to obtain the balance of the proceeds derived from the sale of the corporation property under the Litton execution, Jean McNeil Pepper, executrix, necessarily recognized the validity of the Litton judgment and execution. Though a party to the interpleader proceeding, Smith, trustee, instead of questioning the validity of the Litton judgment, acquiesced in and agreed to a disbursement of the fund by the court.

"The executrix had the unquestioned right to treat the Litton judgment as void and seek its annulment. Likewise, she had the right to treat the judgment as valid and to obtain the benefits accruing to her under the judgment.

"In Eubank & Caldwell v. Fuller, 156 Va. 635, 158 S. E. 884, 885, Justice Gregory held that when a party agrees to the entry of a void judgment, with full knowledge of its invalidity, and accepts the benefits under it, he will not be permitted later to show its invalidity. It (126) was also held in that case the 'Parties may lawfully agree to confirm a void judgment. It may be accepted as valid by their consent.'

"In Johnson v. Powhatan Min. Co., 127 Va. 352, 362, 103 S. E. 703, 705, Prentis, J., quoted with approval this language from Smith v. Baker, L. R. 8 C. P. 350, 42 L. C. P. 155:

"'A man cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage.'

"That the Clinchfield Coal Company was by agreement paid the sum due it by the Dixie Splint Coal Company is beyond question. To permit the executrix, or the trustee who represents her as the sole creditor of the corporation, to nullify their action and require the Clinchfield Company to repay the sum paid to it would be inequitable."

The Referee holds that this question is a res judicata as to Mrs. Pepper.

See Mays v. Fritton, 87 U. S. 414, 22 L. E. 389.
Davis v. Fuellonder, 104 U. S. 552, 26 L. Ed. 818.
Grant v. Buckner, 172 U. S. 232, 43 L. Ed. 430.

If Mrs. Pepper were not estopped this motion would have to be denied as the property has never been in the hands of Dixie Splint Coal Company since the bankruptcy and the Referee would have no right to direct any one to take charge of the property now, but this would have to be determined in a plenary suit. See May v. Hinderson, 268 U. S. 111, 69 L. Ed. 870.

FOURTH

Exception and conditional amended exceptions of Scott Litton to claim of Jean McNeil Pepper for $9,000.00 and etc.

Mrs. Pepper's claim is based on a judgment of the Corporation Court of the City of Bristol. No appeal was ever taken from that judgment and it appears to be a valid judgment in all respects, and the exceptor is estopped to deny the validity of the judgment and therefore the original exception and the amended conditional exceptions are dismissed.

It is directed that a copy of the foregoing be this day (127) mailed to Morison & Heuser, Attorneys, Bristol, Virginia; Henry Roberts, Attorney, Bristol, Virginia; and Wm. T. Bowen, Trustee, Norton, Virginia.

(Signed) JOHN ROBERTS,
Referee in Bankruptcy.

(Stipulation by Counsel):

IT IS STIPULATED, for information, that there is a balance in bank to credit of the Trustee of $6,192.20, and that all labor liens, costs, expenses, and fees have been paid, except commissions of Referee and Trustee.

PETITION OF JEAN McNEIL PEPPER FOR REVIEW.

(128) (Filed February 4, 1938)

(Clerk's Memorandum: Excerpt from petition, omitting from first page to middle of page 3, and beginning at middle of page to end of petition)

This petition recites former proceedings, quotes from opinion of April 21, 1937, and states:

(5) The order of John Roberts, Esq., Referee, entered on February 4, 1938, whereby it was held:

(a) That the Litton judgment is void;

(b) That petitioner is estopped to deny the validity of the Litton judgment;

(c) That the Litton claim is proper and just claim against the bankrupt estate as a common Claim;

(d) That petitioner is estopped to ask an appraisal of the tangible property of the bankrupt sold at execution sale under the void Litton judgment and purchased at said sale by Litton.

(e) That petitioner's claim be allowed and exceptions thereto dismissed.

These holdings will be considered in the sequence stated:

(a) The Referee's decision that the judgment is void is correct and apparently in accord with the views of the

District Court, of the Circuit Court of Russell County and of the Supreme Court of Virginia.

(b) If Petitioner is estopped to deny the validity of the Litton judgment, it was a useless thing for the District Court to remand the proceedings to the Referee for his decision thereon. The District Court, in its decision, held that the petitioner was not estopped to question either the validity of the Litton judgment or its validity as an unsecured claim. Patently, the doctrine of equitable estoppel never applies to a wrongdoer; nor, will a wrongdoer be permitted to invoke a doctrine in the furtherance of fraud.

The District Court further held that the decision of the Supreme Court of Appeals of Virginia, holding that petitioner was estopped to question the validity of the Litton judgment, was not binding upon it and did not prevent it from considering its validity with respect to the administration of the bankrupt estate. The Referee's holding is in direct conflict with the holding of the District Court.

While holding that the Litton judgment is void the Referee, by refusing to make an appraisal of the property purchased under an execution sale issued on the (129) void judgment, is, in effect, holding that the sale is valid, and thus we have, according to the Referee, a valid execution sale under a void judgment. Otherwise, the property is a part of the bankrupt's estate and should be appraised, sold and administered.

(c) The Referee holds that the Litton claim is a valid common claim for $33,468.89, with interest thereon from June 2, 1933. The evidence clearly shows that Litton wholly failed to prove that the said sum was due and owing to him at the date of bankruptcy. The evidence plainly shows that no such sum was due and owing to Litton at said time.

The evidence further shows that Litton's claimed debt was a further attempt to fraudulently evade the payment of income taxes, either individually or for the bankrupt, and to perpetrate a fraud over petitioner's bona fide judgment debt; and, that the said Litton claim is composed of fictitious and exaggerated sums.

Finally, the evidence shows that the major part; namely, $28,041.84, of the Litton claim of $33,468.89,

arises under alleged assignments from P. H. Smith to Scott Litton. Litton completely failed to prove any consideration for said assignments. Litton's own evidence shows that both his own and Smith's alleged debts against the bankrupt were set up on the books of the bankrupt for the purpose of evading income taxes, either on the part of Litton or the bankrupt; and, for the further purpose of defrauding this petitioner from a full recovery of her debt.

(d) The refusal of the Referee to appraise the property which Scott Litton purchased under an execution sale, issued on his judgment, is clearly and patently erroneous. The Referee held that the Litton judgment was void. A valid execution sale can not be made under a void judgment. It follows that all of the property purchased by Scott Litton at said void execution sale, is a part of the bankrupt estate and should be appraised and recovered by the Trustee in Bankruptcy for administration.

(e) The Referee was unquestionably correct in holding that petitioner's claim is a just and valid claim, and, that the exceptions thereto are without merit.

The Referee's decision, in effect, awards to Scott Litton, claiming under a judgment found by the Referee to be void, practically all of the funds now in the hands of the Trustee, and, to leave him in undisturbed possession (130) of all the property he acquired under the void execution sale, and thereby deprives the petitioner, whose claim is admittedly just and free from exception, of any participation in the assets of the estate, although the record in this proceeding unmistakably shows a grossly fraudulent plan on the part of Scott Litton to discharge every debt of the bankrupt with the exception of that of this petitioner, and, by his further frauds to prevent this petitioner from recovering any sum of money from the bankrupt estate.

Wherefore, Petitioner prays that said order of February 4, 1938, be reviewed and reversed in the particulars herein complained of, and, that an order be entered disallowing the claim of Scott Litton, both as a secured claim and as a common or unsecured claim, and direct-

ing that the Trustee, by appropriate proceedings, recover from Scott Litton, or from his donees or vendees, the tangible personal property of the bankrupt attempted to be sold under the void judgment; that Petitioner be granted such other specific and/or general relief as the nature of this case may require, and, that such order be entered in this matter as should have been entered by the Referee.

JEAN McNEIL PEPPER,
Petitioner on Review.

(Signed) A. K. MORISON,
(Signed) M. M. HEUSER,
Counsel.

JUDGMENT OF DISTRICT COURT JUNE 23, 1938.

(131) (Filed June 25, 1938.)

This cause has come before the Court on the petition of Mrs. Jean McNeil Pepper, a creditor, for a review of an order entered by John Roberts, Esq., Referee in Bankruptcy, on the 4th day of February, 1938.

And the Court having considered said order of the referee and the findings therein made and having considered the petition for review of said order, and having this day embodied its conclusions in a written opinion which is this day filed and made a part of the record in this cause,

Now, therefore, for the reasons stated in said written opinion this day filed as well as for the reasons stated in an opinion filed with an order of the Court on April 21, 1937, it is

ORDERED and DECREED

that the finding of the referee, in the order of February 4, 1938, that the judgment in favor of Scott Litton against the Dixie Splint Coal Company in the sum of $33,468.89 purported to have been confessed in the

Clerk's Office of Russell County on June 2, 1933, is void, is hereby approved and affirmed.

2. That the holding nd finding of the referee that either Jean McNeil Pepper, as a creditor, or the trustee in bankruptcy is estopped to deny the validity of said judgment in favor of Scott Litton is disapproved and reversed.

3. That the holding of the referee that the claim of Scott Litton, made up of amounts claimed to be due to him and to P. H. Smith for salaries, is a valid and allowable claim is disapproved and reversed.

4. That the action of the referee in denying the motion of Jean McNeil Pepper for appraisement, as property of the bankrupt, of certain tangible property purportedly sold on June 14, 1934, under an execution under the void judgment in favor of Scott Litton is disapproved and reversed.

5. That the action of the referee in overruling the objections to the allowance of the claim of Jean McNeil (132) Pepper is approved and affirmed.

It is further ORDERED and DECREED

6. That the claim of Scott Litton in the sum of $33,468.89 is not a valid debt owing by the bankrupt either as a secured claim based on his purported judgment or as a general or unsecured debt and the same is hereby disallowed.

7. That the trustee in bankruptcy shall take appropriate and necessary steps to recover for the benefit of the bankrupt estate such property or the value of such property as was sold to Scott Litton on June 14, 1934, under an execution issued on said Litton's void judgment against the bankrupt.

An exception is hereby saved and allowed to Scott Litton to this order and to each of the specific provisions thereof in the paragraphs numbered 2, 3, 4, 5, 6 and 7.

ON PETITION FOR REVIEW OF AN ORDER OF THE REFEREE.

(133)

MEMORANDUM BY THE COURT

(Filed June 25, 1938)

This matter comes before the Court on the petition of Mrs. Jean McNeil Pepper for review of an order entered by the referee on February 4, 1938, and upon a petition of M. M. Heuser and C. W. Hamilton, attorneys, for a review of the same order. Inasmuch as the petitions for review do not involve the same objections, the petition of Mrs. Pepper only will be dealt with in this memorandum.

This matter has previously been before the Court, resulting in an order entered April 21, 1937, in which an order entered by the Referee on February 22, 1937, was reversed and the cause sent back to the Referee for further proceedings to be had in conformity with views expressed by the Court in a written opinion filed with its order of April 21, 1937.

In that opinion, it was intended to make clear the view of the Court that neither the trustee in bankruptcy nor any creditor was estopped from attacking in this proceeding the validity of a judgment purported to be confessed by the bankrupt in favor of Scott Litton and that since such judgment had been attacked it was the duty of the Court to pass upon it. The opinion specifically directed that the Referee should consider and pass upon the question of whether such judgment was void. It further directed that, in case the judgment was found to be void, the Referee should make inquiry into the validity of Litton's claim as a general debt. It is obvious that no direction to inquire into the validity of the judgment would have been given unless the Court believed such inquiry was legally permissible.

However, the Referee has apparently misunderstood the effect of the previous opinion and its necessary implications, for, after finding that the confession of judgment was void, he has again made a finding that Mrs.

(134) Pepper is estopped to attack this void judgment. That there may be no further question or misunderstanding in this respect, it is here stated that the Court intended in its previous opinion to hold and does now again hold and determine that the validity of the Litton judgment is a proper subject of inquiry in this proceeding, that no estoppel exists against the trustee in bankruptcy or any creditor to attack that judgment here and that the validity of the judgment must be passed on by this Court. The reasons for this were set forth in the previous opinion and little need be added to what was there said except to emphasize that the result of the proceedings in the State Court was merely a holding that the trustee could not be there heard to question the judgment because of some supposed estoppel against Mrs. Pepper arising in that Court. The proceeding was brought in the court where the judgment was rendered as a matter of county, not of necessity. When that Court refused to entertain the proceeding or to act upon the prayer of the bill, this did not tie the hands of the bankruptcy court in performance of its duty and right to pass upon the validity of claims asserted in bankruptcy proceedings. Possibly it was an error that the bankruptcy court did not in the first instance pass upon the validity of the judgment without seeking the aid of the State Court; U. S. Fidelity Co. v. Bray, 225 U. S. 205. But when the latter court refused to pass upon the validity of the judgment, this Court was not thereby relieved from doing so.

In his order of February 4, 1938, the Referee, pursuant to the instructions of the Court's previous opinion, has considered and passed on the validity of the Litton judgment. He concludes that because of a failure to comply with the statutory requirements as to confession of judgments, the judgment is void. No exception to his finding in this respect has been taken by Litton and for this reason, as well as because the finding appears sound, it is approved and affirmed. As hereinbefore stated, the Referee's holding that this judgment cannot be questioned in this proceeding is disapproved and reversed.

(135) *The Litton Claim as a General Debt.*

The Referee has held that the claim of Scott Litton for $33,468.99 (the amount of the void confessed judgment)

represents a debt owing and properly payable to Litton. The nature of this asserted debt and the manner in which the amount claimed is arrived at is attended with considerable obscurity. This is due to the fact that Litton and the bookkeeper, Smith, are the only persons who know anything about the basis of this claim, and Litton, in his testimony, was vague, evasive and contradictory, while Smith did not testify at all.

As far as can be determined from the evidence, the alleged claim of Litton for $33,468.99 is based upon the following facts: The Dixie Splint Coal Company, a corporation, was organized in December, 1923, as the successor to and to take over the assets of the Dixie Splint Coal Company, a partnership. Litton had been the dominant figure in the partnership and P. H. Smith its bookkeeper. The organization meeting of the corporation, which was a family affair, was held on December 14, 1923, at which Scott Litton was named President of the corporation, his wife Pauline Jones Litton was named Vice-President and Smith was made Secretary and Treasurer. These same three persons comprised the entire board of directors and continued as such through the life of the corporation. Litton plainly directed the affairs of the corporation, Mrs. Litton did nothing, as far as can be seen, while Smith was Clerk and bookkeeper for the business.

What salaries Litton and Smith were drawing under the partnership is not disclosed. When the corporation was organized, the minutes do not show that any salaries were fixed for any of the officers, but at a meeting of the directors held a few weeks later, February 14, 1924, the minutes show that the salary of Litton was "increased" by the amount of $6,000.00. The typewritten minutes show the salary to be fixed at $6,000, but a handwriting insertion states that the *increase* was in the amount of $6,000. At the same time Smith's salary was increased from $2,700 a year to $8,000. Litton asserts that his salary, after the increase, was $12,000 a year.

However, in setting up the books of the corporation (136) showing the payment of compensation to these parties a peculiar plan was adopted. The company carried one account under the title of "Payroll" under

which were entered payments made to employees. Entries of payments to Smith of $250.00 a month were made under this account and were apparently paid him. The balance of his alleged salary, this balance being $5,000.00 a year, was placed under a separate account headed "P. H. Smith—Personal", and on this account he was credited with $416.66 each month. The books of the company prior to January 1, 1928, were not available or are not shown in evidence; but beginning with that date it is shown that while regular entries, amounting to $5,000 a year, were credited to Smith under this personal account, no such sums were in fact paid to him. Similarly the compensation of Litton was reflected under two accounts. He was paid on the "Payroll" account each month sums in varying amount but which aggregated from $3,000 to $5,700 a year, while there was also a separate account entitled "Scott Litton — Personal" on which he was credited with $500 a month as salary from 1928 to 1931 and with $750 a month for 1932 and 1933. In addition to the payments actually made to Litton on the Payroll account, he appears to have been paid the larger portion, though not all, of the amounts credited to him on his "Personal" account. These payments were of irregular amounts and at irregular times.

On May 10, 1933, the books show the sum of $26,041.64 credited to Smith under his "Personal" account and on that date Smith assigned to Litton a claim in that amount against the corporation in consideration "of $1.00, cash in hand, and other valuable considerations". At the same time, it is claimed, the corporation owed Litton $7,427.25 on his back salary. It is the sum of Litton's alleged debt and that assigned him by Smith which make up the amount of the void judgment which was attempted to be confessed; they are also the basis of Litton's claim as a general debt.

There are many circumstances which invoke question (137) of the validity and good faith of this alleged debt. Litton's testimony about it was evasive and contradictory, and he plainly tried to conceal the truth as to the nature of the claim. In the beginning he testified quite positively that the entire amount was for unpaid salary due to him, Litton. I quote from the testimony.

After stating that the amount of his judgment was for $33,468.89, he was asked.

Q. Did the Dixie Splint Coal Company actually owe you any such sum of money as that? A. They did.
Q. What was it for? A. Services.
Q. Was it for your regular salary, commissions, loans or what? A. Salary, regular salary they hadn't paid me, that the corporation hadn't paid me since it was organized.

He repeated this statement several times and stated that he could show by the books of the corporation that there was past due salary owing to him in the amount of the judgment. When asked if any other officers of the corporation had not been paid in full, he stated that Smith had not. And when asked if the unpaid portion of Smith's salary was not seven or eight hundred dollars, he replied:

"Possibly, I don't recall the exact amount."

It was only when he was asked to show upon the books the foundation for his claim and was confronted with them that he admitted that $26,041.64 of his claim was not for salary due to him but represented the amount supposed to be due to Smith for unpaid salary and assigned by Smith to him. No excuse of confusion or of lapse of memory could justify the lack of truth and candor exhibited by this witness.

It is contended by counsel for Mrs. Pepper that the amounts credited to Litton and to Smith under their respective "personal" or salary accounts do not represent amounts actually due and owing them as salary but (138) that they were set up for income tax purposes in order that they might be reported and deducted as a part of the expense of business in arriving at the net income for taxation, and for the further purpose that Litton and Smith might be in position to appear as creditors if the business got into financial difficulties. The income tax returns of the corporation from 1926 to 1933 have been offered in evidence and they show that "salaries of officers" were reported as follows and utilized in the computation of net income for taxation: For each of the

years 1926, 1928, 1930, 1931 and 1932, salaries were reported at $17,000; 1927 and 1929 at $11,000; and for 1933 at $15,000. Just why the variance in the amounts for the years 1927 and 1929 does not appear. And it is noted that in the years when salaries were reported at $17,000 the schedules in which the individual salaries are supposed to be listed are not filled out and the aggregate amount only is given. Examination of the income tax returns show other unexplained matters. For example in 1929, the report shows a salary of $6,000 to Litton, a salary of $6,000 to Mrs. Litton as Vice-President and a salary of $5,000 to Smith. In an attempt to reconcile the books of the company with its tax returns so many apparent discrepancies appear as to make it impossible to tell how these accounts were handled.

The testimony of Litton is practically an admission that these alleged salaries were entered on the books for income tax purposes and were not bona fide obligations of the corporation. When repeatedly asked if this were not the purpose, he was extremely evasive, refusing either to admit or deny. The most tolerant and least critical view that could be taken of these book charges for salaries is that it was intended, if the corporation showed large profits on its business, these profits should be distributed under the guise of salaries to cut down the income tax; but in the absence of any such profits they were not to be paid and that they were not to be taken as absolute and binding obligations against the corporation. The testimony of Litton practically admits this. As to the supposed salary to Smith, it (139) seems reasonably clear that it was never intended that it should be paid him. While Litton did draw large portions of his supposed salarly in irregular amounts and at odd times through the years from 1928 to 1933, payments to Smith were confined, except for trivial amounts, to the $250 a month paid him on the "payroll account". The claim assigned by Smith to Litton on May 10, 1933 was for $26,041.64. This represented accumulations of salary for over 5 years at a rate of $5,000 a year, which was at the rate at which salary was credited to Smith on his personal or salary account. Every fact and circumstance disclosed argues strongly against the good faith and genuineness of this alleged salary accumulation of Smith, which now forms the larger part of Lit-

ton's claim. In addition to the inferences and implications to be drawn from Litton's testimony, it is impossible to overlook the following significant facts. It is hard to believe that Smith, a bookkeeper and clerk, who had been paid $2,700 a year, should, with no change in the nature of his work, receive a sudden increase in salary to $8,000 a year, except upon an understanding that it was merely for record purposes and not to be paid. It is inconceivable that he should have allowed his salary to accumulate for over five years to the amount of over $26,000 without making any effort to collect any part of it. And it is even harder to believe that if he had a valid debt against the corporation for over $26,000 he would assign all interest in it for $1.00. It is true that the assignment was for $1.00 and "other considerations", but when Litton was asked what the "other considerations" were he answered vaguely and finally stated that he was unable to say what they were.

In that portion of the referee's report dealing with the nature of Litton's claim, the referee seems to have assumed that because these disputed salaries were shown on the income tax reports of the Dixie Splint Coal Company and used in the computation of the company's net income, they represented a valid and existing debt. He, therefore, allowed the claim in full. The referee does not discuss, but completely ignores, the very question (140) which has been raised against the claim, namely, that the debt is fictitious and was set up for the very purpose of obtaining an advantage in the payment of income taxes. He overlooks the fact also that, even if the debt were a valid one, a substantial part of it is barred by the statute of limitations. It would have been barred if asserted by Smith and the latter's assignment to Litton did not help that situation.

However, I am of opinion that the entire claim should be disallowed. I am convinced that neither the alleged salary due Litton nor that due Smith represents an honest debt owing by the bankrupt corporation. On the other hand, the evidence is strong that these alleged salaries were voted and set up for the double purpose of using them to lessen income taxes and to enable Litton to appear as a creditor of the corporation in case it became financially involved. In the latter purpose they

enabled Litton, in case the corporation became insolvent, to step in with a claim so large as to assure that he would procure the major part of any distribution made, to the disadvantage of honest creditors. And it was so used. While Mrs. Pepper's suit against Dixie Splint Coal Company was pending, and in evident anticipation of its outcome, Litton took the assignment of Smith's alleged claim and caused the confessed judgment to be entered in his favor. To this Court it appears that the matter of these alleged salaries was a part of an entire plan aimed to defeat the collection of the debts of any honest creditors which the Dixie Splint Coal Company might have had and which culminated in the judgment confessed in favor of Litton and the execution sale thereunder—a matter upon the moral phases of which the Court has already commented in its previous memorandum.

But even if we assume, and it would be the most tolerant assumption that could be made, that the salaries credited to Litton and Smith were intended to be paid whenever the profits of the company permitted and that this was merely a manner of distributing profits in the guise of salaries rather than as dividends, the claims (141) would still not be allowable. They were not fixed liabilities absolutely owing, but were merely contingent or conditional obligations which are not provable. The testimony of Litton, under cross examination, is practically an admission of the contingent nature of these alleged obligations for salaries.

The Motion to Appraise the Property Sold Under the Void Judgment.

The Court, in its previous memorandum held that the trustee was not estopped to question the validity of the Litton judgment and directed the referee to determine whether the judgment was void. In the last proceedings before the referee and relying on the finding that the judgment was void, counsel for Mrs. Pepper asked that the referee direct an appraisement to be made of the value of the property which had been sold under execution issued on the void judgment. It appears that this property was bought in for $3,250 by Litton, who testifies that he bought it as agent for another corporation which was then in process of formation. But the records

of this new corporation, known as Dixie Beaver Coal Company, show that shortly after acquiring the property at the execution sale, Litton transferred it to the new corporation at a valuation of $20,135.36, to be paid for in stock of the corporation; and a resolution of the directors of the corporation certifies that in their judgment the property "formerly owned by Dixie Splint Coal Company and now owned by Scott Litton is worth $20,135.36 in current money of the United States and we fix the value of same at this sum, which is to be paid for in stock".

The referee, in addition to holding that Mrs. Pepper was estopped to question the validity of the Litton judgment, expressed the view that the motion now considered came so late as to make Mrs. Pepper guilty of lasches and justified denial of the motion on this ground also. It is difficult to see wherein the view of the referee is justified. Mrs. Pepper has never acquiesced in the valid-
(142) ity of the judgment nor ceased to question it. While her suit for the purpose of having it declared void was pending, the Dixie Splint Coal Company went into bankruptcy. Since then the trustee in bankruptcy representing the creditors, has been trying to get a declaration as to the validity of the judgment. Not until the referee, in the order now under review, held that the judgment was void, was there any definite determination of that fact. Until there was such a determination no action looking toward an accounting for the value of the property was applicable. It was promptly taken as soon as it was proper to do so.

A judgment which is void is a mere nullity and affects the rights of no one. It has merely the semblance of a judgment, 34 C. J. 509. In Freeman on Judgments (4th Ed.) it is said:

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded on it are equally worthless. It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at

a sale by virtue of its authority finds himself without title and without redress. * * * * *"

If the Litton judgment was void as the referee has determined and as seems to be generally conceded, then it follows that the purported sale under execution was of no effect, that no title passed thereby and that the property purported to be sold may be pursued as the property of the bankrupt and it or its value recovered for the benefit of the bankrupt estate. The value of the property should be ascertained and it should be disposed of as assets of the estate.

The evidence taken in this case and the disclosures made thereby since its previous consideration by the Court serve only to give additional weight to the belief previously expressed that the Litton claim and every step taken in connection with it were parts of a planned and fraudulent scheme to prevent the collection of their debts by honest creditors. The claim had a fictitious basis in the first place and was never asserted until there seemed a prospect that Mrs. Pepper would obtain a judgment on a debt justly due her. The confessed judgment was void and the sale under it obviously little (143) more than a gesture whereby Litton was enabled to buy in the entire tangible property of the corporation at a nominal sum and transfer it to another of his one man corporations, thereby enabling him to continue in business after having prevented payment of his honest debts. If courts of equity, with full knowledge of such a state of facts as are here disclosed are powerless to interfere, then they are grossly misnamed and the law becomes the shield of fraud rather than a weapon against it.

While the facts in the case of Buffum v. Barceloux Company, 289 U. S. 227, are not on all fours with the present case, there is a striking similarity in the calculated and fraudulent plan to avoid payment of a debt and in the manner in which the affairs of family corporations may be handled to that end and much that is said in that case is applicable here.

The Objection to the Allowance of the Claim of Mrs. Jean McNeil Pepper.

Counsel for Litton offered what is termed a conditional objection to the allowance of the claim of Mrs. Pepper for $9,000. The referee overruled the objection and allowed the claim and no review of the referee's action in this respect has been applied for. For this reason and because the objection was plainly trivial and without merit, the action of the referee in this respect is approved without discussion.

An order will be entered carrying out the views expressed in this memorandum.

(Signed) JOHN PAUL
District Judge.

June 23, 1938.

(143-A) **CLERK'S MEMORANDUM:**

The following items of the stipulation as to contents of the record in this case on appeal to the United States Circuit Court of Appeals for the Fourth Circuit are supplied in the original instead of being copied into the record, as directed by counsel, by transmitting along with the transcript of the record in this case a copy furnished to the Clerk for that purpose by counsel for the respective parties hereto of what is agreed by them to be:

(1) a copy of the printed record in the Supreme Court of Appeals of Virginia, at Wytheville, at the June Term, 1936, of the case of P. H. Smith, Trustee, etc. v. Scott Litton, as described in item 28;

(2) a copy of the printed record in the case of Jean McNeil Pepper, Executor, etc. v. Hon. Floyd H. Roberts, Judge, etc., entitled Petition for Mandamus, as described in item 29; and

(3) Report of the Referee of August 23, 27, and September 10, 1937, and exhibits attached thereto; certi-

fied copies of what purports to be Income Tax Returns filed by Dixie Splint Coal Company with United States Collector of Internal Revenue for the years 1924 to 1934, as described in item 31D.

(4) The Clerk cannot furnish item 30.

(Filed July 18, 1938. (Signed) C. E. GENTRY, Clerk.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA,
(144) AT BIG STONE GAP.

Re: Dixie Splint Coal Company, Bankrupt.

Scott Litton,

vs.

Jean McNeil Pepper.

ASSIGNMENT OF ERRORS.

(Filed: July 18, 1938.)

And the said Scott Litton assigns the following errors in the record and proceedings in said cause:

The District Court of the United States for the Western District of Virginia, at Big Stone Gap, erred in entering the order and judgment of June 23, 1938, and erred in each of the seven respective holdings or judgments embraced in said order, wherein it was ordered and decreed:

"1. That the finding of the referee, in the order of February 4, 1938, that the judgment in favor of Scott Litton against the Dixie Splint Coal Company in the sum of $33,468.89 purported to have been confessed in the Clerk's Office of Russell County on June 2, 1933, is void, is hereby approved and affirmed."

"2. That the holding and finding of the referee that

either Jean McNeil Pepper, as a creditor, or the trustee in bankruptcy is estopped to deny the validity of said judgment in favor of Scott Litton is disapproved and reversed."

"3. That the holding of the referee that the claim of Scott Litton, made up of amounts claimed to be due to him and to P. H. Smith for salaries, is a valid and allowable claim is disapproved and reversed."

"4. That the action of the referee in denying the motion of Jean McNeil Pepper for appraisement, as property of the bankrupt, of certain tangible property purportedly sold on June 14, 1934, under an execution under the void judgment in favor of Scott Litton is disapproved and reversed."

"5. That the action of the referee in overruling the (145) objections to the allowance of the claim of Jean McNeil Pepper is approved and affirmed."

"6. That the claim of Scott Litton in the sum of $33,468.89 is not a valid debt owing by the bankrupt either as a secured claim based on his purported judgment or as a general or unsecured debt and the same is hereby disallowed."

"7. That the trustee in bankruptcy shall take appropriate and necessary steps to recover for the benefit of the bankrupt estate such property or the value of such property as was sold to Scott Litton on June 14, 1934, under an execution issued on said Litton's void judgment against the bankrupt."

For which errors Scott Litton, appellant in the appeal prayed for, prays that the said judgment and order of the United States District Court for the Western District of Virginia, at Big Stone Gap, dated June 23, 1938, in the above entitled cause be reversed, set aside and annulled, and for general relief.

SCOTT LITTON
By (Signed) IRA M. QUILLEN
(Signed) HENRY ROBERTS

Copy of the above Assignment of Errors received July 18, 1938.

JEAN McNEIL PEPPER,
By (Signed) M. M. HEUSER,
Of Counsel.

STIPULATION OF COUNSEL AS TO WHAT SHALL CONSTITUTE THE RECORD ON APPEALS, AND TO PRINT SAME IN ACCORDANCE WITH RULE 23, OF THE U. S. CIRCUIT COURT OF APPEALS.

(146) (Filed August 11, 1938)

(Title of Court and Style of Case Omitted).

It is hereby stipulated and agreed between Counsel for Scott Litton, Appellant, and Jean McNeil Pepper, Appellee, parties to the above entitled cause, as follows:

A. That the Record on Appeal shall contain the following:

1. Stipulation as to Petition for Adjudication.

2. Minutes first creditors meeting, Sept. 26, 1934. (Digest and excerpt)

3. Claim of Scott Litton for $33,468.89, etc., Exceptions of Jean McNeil Pepper thereto and Answer of Scott Litton to Exceptions Amended Exception to Litton Claim.

Note: All papers and Exhibits to these and all other papers printed in record in case of P. H. Smith, Trustee, vs. Scott Litton, June Term, 1936, Supreme Court of Appeals of Virginia, to be omitted from transcript, and referred to in said "Virginia Record".

4. Petition of Jean McNeil Pepper to Intervene in State Court Referee's Orders on said petition.

5. Claim of Jean McNeil Pepper for $9,000.00, etc.

Exceptions of Scott Litton thereto, and Amended, conditional, Exceptions of Litton thereto.

6. Minutes Creditor's Meeting November 8, 1934.

7. Petition of Heuser and Hamilton to file Independent Proceeding Objections of Scott Litton to said petition.

8. Referee's Order requiring Jean McNeil Pepper to execute bond for costs, etc., and stipulation as to order thereon.

9. Petition of Jean McNeil Pepper to Review Order for Bond.
(Recital and excerpt)

10. Order of District Court April 16, 1935, Approving (147) Order requiring said bond.

11. Stipulation as to Minutes Creditors Meeting April 23, 1935.

12. Referee's Order of June 25, 1935.
(Recital and excerpt)

13. Report of Hamilton & Heuser on Virginia Courts Litigation.

14. Referee's Order February 6, 1937, as to Funds, with Excerpt from Trustee's report.

15. Petition of Jean McNeil Pepper to Garnishee Funds, And note as to order thereon.

16. Referee's Order of February 22, 1937.

17. Petition of Jean McNeil Pepper for Review.
(Recital and excerpt)

18. Referee's Certificate of March 4, 1937.
(List of papers and names omitted)

19. Order of District Court April 21, 1937.

20. Memorandum Opinion of District Judge April 21, 1937.

21. Narrative of Proceedings before Referee August 23, 27, and Sept. 10, 1937.

22. Referee's Order of February 4, 1938, and stipulation at end thereof.

23. Petition for Review of Jean McNeil Pepper. (Recital and excerpt)

24. Judgment of District Court June 23, 1938.

25. Memorandum Opinion of District Judge June 23, 1938.

26. Assignment of Errors.

27. This Stipulation.

28. The Printed record in the case of P. H. Smith, Trustee, of the estate in Bankruptcy of Dixie Splint Coal Company, Incorporated Bankrupt vs. Scott Litton, in the Supreme Court of Appeals of Virginia, at Wytheville, June Term, 1938, referred to in the Transcript as "Virginia Record".

29. The printed record in the case of Jean McNeil Pepper, Executor, etc., vs. Hon. Floyd H. Roberts, Judge, etc., in the Supreme Court of Appeals of Virginia, at Wytheville, June Term, 1936, entitled Petition for Mandamus.

NOTE: It is agreed that, with the approval of the (148) United States Circuit Court of Appeals, for the Fourth Circuit, that five copies of each of the two printed records last mentioned, may be supplied, without printing the usual 40 copies thereof.

30. The published reports of the decisions of the Supreme Court of Appeals of Virginia in the cases of Smith v. Litton, 167 Va. 263, 188 S. E. 214; and Pepper v. Dixie Splint Coal Co., et al, 181 S. E. 406, 165 Va. 179.

31. The transcript of Record, under the foregoing titles, and various other title or sub-titles, set out in the index, has been examined and agreed to and approved, including the "Narrative of Proceedings before Referee, August 23, 27, and Sept. 10, 1937", as a true and correct copy of the record herein.

B. The data required by Sub-Section 7 of Rule 14 of the United States Circuit Court of Appeals.

C. That the record shall be printed under the supervision of the Clerk of the United States Circuit Court of Appeals under the rules of said Court pertaining thereto,

D. The original report of the hearing before the Referee of August 23, 27, and September 10, 1937, and the exhibits attached thereto; and the certified copies of Income Tax Returns filed by Dixie Splint Coal Company with the United States Collector of Internal Revenue, for the years 1924 to 1934; and any exhibits or original documents, books, filed in the case, requested by counsel for either party, or by the Court, shall be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals, for use at the hearing and in that Court.

HENRY ROBERTS,
Of Counsel for Appellant.

M. M. HEUSER,
Of Counsel for Appellee.

(Memorandum of Counsel):

(149) **"VIRGINIA RECORD" and "PETITION FOR MANDAMUS".**

Copies of the printed records in the cases of Smith Trustee vs. Litton, and Pepper vs. Floyd H. Roberts, Judge, referred to in the transcript as indicated above, and described under items Nos. 28 and 29 in the Stipulation for record on appeal, are attached and appended hereto as a part of this Transcript of Record.

MEMORANDUM REQUIRED BY RULE 14, SECTION 7, OF THE RULES OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

I, C. E. Gentry, Clerk of the United States District Court for the Western District of Virginia, at Big Stone Gap, Virginia, certify as follows:

That petition for appeal was filed July 18, 1938;

That the order allowing appeal was entered and signed on July 18, 1938;

Appeal and Supersedeas Bond, dated and filed July 18, 1938; Scott Litton, obligor; Penalty $5,000.00, conditioned to pay all damages and costs; a United States Government Bond for $5,000.00 pledged as security.

That the citation is dated July 18, 1938, and that service of said citation is accepted by counsel for the appellee on July 18, 1938;

That the original papers mentioned in this memorandum (other than the Government Bond for $5,000.00), and the original report of proceedings before Referee of August 23, 27, and Sept. 10, 1937, with exhibits attached thereto, and the certified copies of income tax returns described in Clause "D" of the Stipulation for Record on Appeal, have been sent to the Clerk of the United
(150) States Circuit Court of Appeals, at Richmond, Virginia.

Given under my hand this 17th day of August, 1938.

C. E. GENTRY, Clerk.
By ANNE WINSLOW,
Deputy Clerk.

(SEAL)

CLERK'S CERTIFICATTE.

I, C. E. Gentry, Clerk of the United States District Court for the Western District of Virginia, at Big Stone Gap, Virginia, certify that the foregoing is a true and correct transcript of the record and proceedings of the District Court of the United States for the Western District of Virginia in the matter of Dixie Splint Coal Company, Bankrupt No. 846, made up in accordance with stipulation of counsel filed August 11, 1938.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court this 17th day of August, 1938.

C. E. GENTRY, Clerk.
By ANNE WINSLOW,
Deputy Clerk.

(SEAL)

IN THE

Supreme Court of Appeals of Virginia

AT WYTHEVILLE.

JUNE TERM, 1936.

P. H. SMITH, TRUSTEE OF THE ESTATE IN BANKRUPTCY OF DIXIE SPLINT COAL COMPANY, INCORPORATED, BANKRUPT.

vs.

SCOTT LITTON.

FROM THE CIRCUIT COURT OF RUSSELL COUNTY, VA.

"The Briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with the Act of Assembly approved March 16th, 1903; and the Clerks of this Court are directed not to receive or file a Brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

J. M. KELLY, *Clerk.*

IN THE

Supreme Court of Appeals of Virginia

AT WYTHEVILLE.

JUNE TERM, 1936.

P. H. SMITH, TRUSTEE OF THE ESTATE IN BANKRUPTCY OF DIXIE SPLINT COAL COMPANY, INCORPORATED, BANKRUPT.

vs.

SCOTT LITTON.

PETITION.

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Your petitioner, P. H. Smith, Trustee of the estate in bankruptcy of Dixie Splint Coal Company, Incorporated, Bankrupt, complains of a judgment rendered against him by the Circuit Court of Russell County, Virginia, on the 8th day of March, 1935, in the action pending in said Court wherein said petitioner was plaintiff and said Scott Litton was defendant. Petitioner's action was a motion in writing to vacate, annul and set aside a certain purported judgment confessed by the bankrupt corporation, prior to its bankruptcy, in favor of said Scott Litton, President and chief stock owner of the corporation, for the sum of $33,468.89 with interest thereon

from the 2nd day of June, 1933, and to quash all execution had on said purported judgment. The reasons for said motion were set forth therein, being in short, that the said purported judgment was void on its face for the want of compliance with the Statute in such cases made and provided (Section 6130a of the Code of Virginia). (Transcript page 2). The defendant demurred to said motion and the Court overruled his demurrer, finding that the said purported judgment was void upon its face for the reasons assigned in plaintiff's motion. (Transcript page 16). The defendant then filed his plea alleging that the plaintiff, through his counsel, had taken such positions in other litigation that he should not now be heard to assert the invalidity of the said purported judgment, and that only one creditor of the bankrupt would profit by having the purported judgment set aside, and that this creditor had previously taken such positions in other litigation that she would be estopped to assert the invalidity of the purported judgment, and that, therefore, the trustee in bankruptcy was likewise estopped. (Transcript page 17). The plaintiff moved the Court to strike said plea, the motion being in writing and the reasons therefor set forth therein. (Transcript page 21). The Court overruled the motion and the plaintiff excepted. This is set forth in Exception No. 1. (Transcript page 24). Nevertheless the defendant filed an amended plea, which alleged the same matter as the plea in more detail, and in addition alleged that a sale had been had under an execution from said purported judgment, and that an innocent party had become the purchaser, and further that the bankrupt corporation, the judgment debtor, prior to its adjudication as a bankrupt, had treated the said judgment as valid. (Transcript page 25). The plaintiff at this point craved over of certain records referred to by defendant in its plea and amended plea, which was granted over objection of defendant, and filed his written motion, setting forth the reasons therefore, to strike defendant's said amended plea. (Transcript page 39). The Court overruled this motion and the plaintiff excepted, as set forth in "Exception No. 2.", (Transcript page 32). The plaintiff, thereupon filed his general traverse, (Transcript page 31), and the Court heard the evidence, without the intervention of a jury.

At the close of defendant's evidence, plaintiff by counsel, moved the Court to strike out said evidence on the grounds that same was irrelevant and immaterial to the issues of the case, and failed to support the defendant's allegations. The Court overruled this motion, and plaintiff, by counsel, excepted, which is set forth in "Exception No. 3". (Transcript page 191). This motion was *renwed* at the close of all the evidence and again overruled by the Court, "Exception No. 4." (Transcript page 228).

It might also be said that during the course of the trial, plaintiff, by his counsel, made four exceptions to the Court's rulings on the admissibility of evidence. These are set forth in Exceptions numbered 5, 6, 8 and 9. (Transcript pages 229, 230, 232 and 233).

After the conclusion of the trial, the Court entered the final judgment complained of, and furnished counsel with his written opinion. As will be seen, the Court found that the purported confessed judgment was void upon its face; that the plaintiff had done nothing to estop himself from asserting the invalidity of the judgment, but found from the evidence that there was only one general creditor of the bankruptcy estate and that this only general creditor had previously taken such position in legal proceedings, that she would not now be heard to assert the invalidity of said judgment, and that, therefore, the trustee in bankruptcy would not be heard to assert the invalidity of the judgment. The plaintiff's objection to the Court's final order or judgment in the case was that same is contrary to the law; contrary to the evidence; and contrary to the law and the evidence, as is set forth in "Exception No. 7", page 231.

The facts as shown by the record might be briefly summarized as follows:

On June 2nd, 1933, the Dixie Splint Coal Company, Incorporated, attempted to confess a judgment against itself in the Clerk's Office of the Circuit Court of Russell County, Virginia, the attempted judgment being in favor of Scott Litton, who it has been shown was the chief officer and principal stock owner of the said corporation. The judgment is for an erroneous sum, namely: $33,468.89, with interest thereon from its date,

and costs; a sum so large indeed that when all of the tangible assets of the corporation were sold under execution sale, considerably less than 10% of the amount of said judgment was realized.

Upon the defendant's demurrer to plaintiff's motion in this action, this purported judgment has been found to be a nullity, quite properly, we think.

We next see that the defendant made no attempt to have execution of his judgment for more than nine months, a writ of fieri facias being issued and levied on all the tangible property of the corporation on March 19, 1934. Theretofore, on Feb. 19, 1934, Mrs. Jean McNeil Pepper, Executrix and sole devisee of her deceased husband, A. P. Pepper, obtained a judgment for $9000.00 against Dixie Splint Coal Co. in the Corporation Court of the City of Bristol. On motion of defendants' counsel a stay of execution for ninety days was granted. It will be seen that it was during this stay period that the execution from the Litton judgment was levied. On May 31, 1934, Mrs. Pepper caused an execution on her judgment to be placed in the hands of M. C. Chafin, a deputy sheriff of Russell County, Virginia. Up to this time no sale had been made under the levy of the execution on the Litton judgment, although the levy had been made for two and a half months. The same deputy sheriff who received Mrs. Pepper's execution also had the Litton execution. One June 2, 1934, Mrs. Pepper's execution was levied on exactly the same property that the Litton execution had been levied upon, but for some unexplained reason the deputy sheriff advertised his sale for June 14, 1934, as being only under the Litton execution. Two days prior to the sale the deputy sheriff received a written notice from the Clinchfield Coal Company, claiming a prior lien on all of the property levied upon in the sum of $2,153.00.

Although he had been given no indemnifying bond the deputy sheriff held his sale on the day advertised, and Scott Litton became the purchaser of all the goods for $3,200.00. He stated that he was acting for a corporation he was forming to be known as the "Dixie Coal Company." On the day after the sale, June 15th, 1934, the deputy sheriff instituted an interpleader proceeding in the Circuit Court of Russell County, Virginia and im-

pleaded Scott Litton, Jean McNeil Pepper, Executrix, etc., and the Clinchfield Coal Company, seeking to have determined the proper claimant to the proceeds of the sale.

Both Scott Litton and Mrs. Pepper filed written answers in the interpleader suit admitting that the Clinchfield Coal Company had a prior lien upon the goods sold and therefore upon the proceeds of the sale. Mrs. Pepper had theretofore commenced a suit in equity against Scott Litton attacking the validity of his judgment and the answer she filed in the interpleader as follows:

> "*Without prejudice to her rights and claims asserted* in the Chancery cause of John McNeil Pepper, Executrix, against Scott Litton, et al. now pending in the Circuit Court of Russell County, Virginia, the general subject of which is to set aside and have declared void the judgment under which the sale was made, from which N. C. Chafin, Deputy Sheriff for N. F. Castle derived the fund here in question answers that she admits the priority of the lien asserted by Clinchfield Coal Company in the sum of Two Thousand one hundred and fifty three dollars ($2,153.00)", (Transcript page (90).

On October 2, 1934, after the adjudication of the judgment debtor as a bankrupt, Mrs. Pepper also filed a motion to quash and set aside the Litton judgment, similar to the present motion. No final judgment was had in the chancery suit prior to the bankruptcy of the judgment debtor, and for obvious reasons, the motion to quash could not be maintained by Mrs. Pepper.

Less than four months after the levy of Mrs. Pepper's execution upon the goods and chattels of Dixie Splint Coal Co., Inc., and more than four months after the levy of the execution issued on the Scott Litton judgment, said corporation was upon its voluntary petition adjudged a bankrupt by the District Court of the United States for the Western District of Virginia. The petition in bankruptcy was filed on September 4th, 1934, and the adjudication had on September 7th, 1934, and the matter referred to John Roberts, one of the Referees in Bankruptcy of said Court. On September 26th, 1934, the first meeting of creditors was held and P. H. Smith

was elected trustee of the estate of said bankrupt. On that date several claims were proved, both general and preferred. As appears from the evidence, Scott Litton immediately thereafter set out to purchase all the general claims proof of which had been filed in the bankruptcy court, and succeeded in causing them all to be either withdrawn or assigned to him, except three small labor claims filed by Grady Astrop, Russell Williams and A. C. Jones. It is very apparent that Mr. Litton intended to purchase or have assigned to him every general claim, except Mrs. Pepper's. Mr. Litton has failed to state why he purchased all the other general claims and not Mrs. Pepper's, but his purpose in attempting to put Mrs. Pepper in the position of being the only general creditor in the bankruptcy matter is made manifest by the defense he attempted to set up in the present suit. At this point, we wish to call to the attention of the Court that at no place in the pleadings or in the evidence is it asserted, inferred or insinuated that Mrs. Pepper's claim against the Dixie Splint Coal Company, Inc. was other than a bona fide and a just one.

Some time subsequent to the date of the first meeting of the creditors in the above mentioned bankruptcy matter the trustee was authorized by the referee to intervene and suggest the bankruptcy of the Dixie Splint Coal Company in several pending suits in which its assets were involved. One of such suits was the interpleader suit mentioned herein. In that suit the trustee obtained a certain sum of money, but in two or three days returned the same. All the circumstances connected with that transaction will not be mentioned as the trial court quite properly held that the trustee's action therein would not constitute a basis for an estoppel against him in the present action, principally on the ground that the counsel at that time acting for him was also attorney for Scott Litton.

Prior to the trial in the present suit, Mrs. Pepper filed her general claim for approximtaely $9,000.00 in the bankruptcy matter of Dixie Splint Coal Company, Inc., and the same was excepted to by Scott Litton upon the ground that the same was not yet a final judgment and was pending in the Supreme Court of Appeals of Virginia. (The exception to Mrs. Pepper's claim has not been passed upon by the referee).

At the date of the first hearing herein Mrs. Pepper formally dismissed her two above mentioned suits attacking the validity of the Litton judgment.

The Referee in Bankruptcy testified *that at the present time of the trial in this case, it would be impossible for him to judicially determine who are to be general creditors in the Dixie Splint Coal Company, Inc. matter.* He also testified that there yet remained time in which other creditors of the estate could file proofs of claim; that the claims filed as preferred claims might be disallowed as such and allowed as general claims; that as the matter now stands a part of the claims of Grady Astrop and Russell Williams and A. C. Jones are general claims and remain unassigned to any one.

The following opinion is that rendered by the Judge of the Trial Court, before whom this action was heard, and is all of the opinion rendered by the said Court on the 8th day of March, 1935:

"P. H. Smith, trustee in Bankruptcy for Dixie Splint Coal Company, Inc., Plaintiff
vs. (Notes of decision)
Scott Litton, Defendant.

This is a proceeding to set aside and vacate a judgment confessed in the Clerk's Office of this court, by P. H. Smith, Secretary-Treasurer of Dixie Splint Coal Company, Inc., in favor of Scott Litton, a director and the President of said Corporation, on the 2nd day of June, 1933, for the sum of $33,468.89, for the alleged reason that said judgment was void, and for the quashing of executions issued thereon.

No question is made as to the validity or bona fides of defendant's claim, upon which the judgment was attempted to be confessed, nor as to the status of said corporation as to solvency or insolvency at the time of the alleged confession of judgment, nor as to the right of said Scott Litton to obtain a lien in his favor as against the other creditors of said corporation, but the grounds relied upon to sustain the contention that said judgment is void in that it was not confessed under authority nor in the manner required by law.

It is contended by the plaintiff that the sole question which can be considered by the court, in this proceeding, is whether or not the said judgment, in its inception, was a void or a valid judgment, and that the sole source of information for the determination of this question is the record of said confession. On the other hand, the defendant while contending that the judgment is valid, also contends, that even if it were originally void, plaintiff is estopped to assert its invalidity in this proceeding or to have any relief herein.

The determination of the issues raised, it is thought, requires a statement of the facts disclosed by the record.

It appears that three executions were issued upon the aforesaid judgment, but in this proceeding consideration has been given to one, only, of said executions; that is the one issued on the 19th day of March, 1934. The record is silent as to the reason for, or the proceedings, if any, had, or the dispositions made of the two other executions, and no further consideration will be given to these.

As above stated, an execution was issued on the aforesaid judgment on the 19 day of March, 1934, delivered to the sheriff of Russell county and by him on that day levied upon the tangible personal property of Dixie Splint Coal Company, Incorporated.

On the 31st day of May, 1934, an execution was issued upon a judgment for $9000.00, which had theretofore been obtained in the Corporation Court of the City of Bristol by Jean McNeil Pepper, Executrix, against Dixie Splint Coal Company, Inc., and which said execution was levied upon said property of said corporation on the 2nd day of June, 1934.

On the 14th day of June, 1934, the said property levied upon was sold under the execution issued on the Scott Litton judgment. At this sale Scott Litton became the purchaser at the price of $3200.00. The Sheriff, not being advised as to the disposition to be made of the proceeds from said sale, instituted interpleader proceedings in the Circuit Court of Russell county, to which Scott Litton, Jean McNeil Pepper, executrix and Clinchfield Coal Corporation, claimant of a prior lien upon the prop-

erty sold as a creditor of Dixie Splint Coal Co., were made parties. In the proceeding the fund derived from the said sale was directed to be paid over to the Clerk of this court, to be held by him subject to the further order of this court.

Certain proceedings were instituted by Jean McNeil Pepper, executrix, in the Circuit Court of Russell county attacking the validity of the judgment of Scott Litton. An answer was filed by her in the aforesaid interpleader proceedings, whereby she undertook, without prejudice to her contention that the Litton judgment was void, to agree for a large part of the fund derived from the sale of the property under the Litton judgment and execution, should be paid to the Clinchfield Coal Corporation, in satisfaction of its claim. All parties to said action agreeing thereto, said payment was accordingly directed and made to the Clinchfield Coal Corporation.

Afterwards on September 7th, 1934, Dixie Splint Coal Company, Inc., was, upon a petition filed by it, adjudicated bankrupt, in the District Court of the United States for the Western District of Virginia. Said P. H. Smith was appointed trustee for said bankrupt and I. M. Quillen or Quillen and Quillen, who were attorneys for Scott Litton, were selected as attorneys for said trustee.

Subsequently, on October 3rd, 1934, a petition was filed by said trustee in the interpleader proceedings, by his counsel, I. M. Quillen, asking that the Circuit Court of Russell county, direct that the balance of the fund remaining in the hands of the Clerk, derived from the sale under the Litton execution be paid over to the trustee in bankruptcy. On November 1st, 1934, an order was entered in said interpleader proceedings, agreed to by Jean McNeil Pepper, executrix, the sheriff and Scott Litton, directing that the balance of said fund should be paid to said trustee. The Clerk thereupon drew a check for the amount and delivered same to the trustee or rather to his attorney who delivered it to the trustee. From sources outside the record, it was learned that the trustee in bankruptcy would probably desire to challenge the validity of the Litton judgment. The apparent inconsistency of the trustee's posi-

tion was then called to the attention of the Referee in Bankruptcy by this court. The trustee was directed to return to the Clerk of this court the said balance of said fund which had been paid over to him by check. The check was returned and the fund is now held by the Clerk of this court.

So far as is known and so far as the record shows, it is thought the real controversy in this case arises from the contention of the plaintiff that the Litton judgment is void; that the sale made under it is void and should be so declared and the title to the property sold under the execution should vest in the trustee, while the defendant claims the sale should be upheld, the plaintiff should be denied relief in this action and should have the balance of the proceeds from said sale under the Litton execution.

It appears from the record that there is more than sufficient funds in the hands of the trustee to pay all preferred claims, against the bankrupt. It also appears that Jean McNeil Pepper, executrix, is the only common creditor, who desires the trustee to prosecute this proceeding and is the only creditor who would, in any event profit by the avoidance of said judgment and the setting aside of said sale. All of the other common creditors, for reasons which are thought to be apparent, but immaterial to this controversy, have disclaimed and declined to claim as common creditors of the bankrupt. The trustee in this proceeding represents the claim of Jean McNeil Pepper and no other.

The issue which appears to be pertinent to this controversy will now be considered.

The first contention of the plaintiff is that the Litton judgment is void because not confessed pursuant to the authority and in the manner required by law; that it was not confessed by the debtor itself, but was attempted to be confessed by an officer or agent without written authority and without complying with the requirements of Code section 6130a, for the confession of judgment by an attorney in fact. In support of this contention plaintiff introduces the records of this court of the alleged confession, which records fail to show any power of attorney or written authority to said Smith for the

confession of said judgment, but to show that the corporate seal of the Dixie Splint Coal Company was affixed to the confession of judgment.

To this contention the defendant answers: (a) that the records show that the judgment was confessed by the corporate entity itself, and (b) that the corporate seal having been affixed to the confession, it is presumed from this (Big Bein, etc. Co. v. Browning, 137 Va. 34) that Smith had all proper authority required by law to confess said judgment.

Without undertaking to say that a corporation could not confess judgment except by an agent (although I can not conceive of its doing so), it is thought the record shows merely an undertaking to confess by an agent, and the first of defendant's contentions in this respect is thought to be without merit. As to the second contention of defendant, it is true that the affixing of the corporate seal to an instrument implies the authority upon the part of the agent to execute such instrument for the corporation. But here the entire records of the alleged confession of judgment were introduced, and they show no written authorization to confess said judgment. Such written authorization is an essential part of the records, in the confession of judgment by an agent. A plaintiff is not required to prove a negative, not involving fraud or crime etc. Hinchman v. Lawson, 5 Leigh 695. The fact of the existence of such an instrument, if it in fact existed was peculiarly within the knowledge of defendant. He had the right to prove such authorization by evidence aliunde. Caldwells v. Shields, 2 Rob. 305. It is thought the production of the records by the plaintiff which failed to show the written authority required was sufficient to rebut the presumption of authority arising from the affixing of the seal of the corporation, and placed the burden of showing such authority upon the defendant. He has failed to sustain this burden. Upon the record as made, it is thought to appear that the judgment was confessed without proper authority; that the attempted confession shows a failure to comply with the essential requisites of the statute and that the judgment is therefore void. Howell v. Gilt Edge Mfg. Co. 32 Nebraska 627, 49 N. W. 704, 34 C. J. 102.

The contention that the judgment was ratified by the corporation is likewise without merit. No ratification by the corporation, could as to other judgment creditors render such judgment valid. As between the corporation and Litton, the corporation might estop itself from denying the validity of said judgment, by a ratification of it, but it could not thereby destroy the rights of other creditors to rely upon its invalidity. Neal v. Utz 75 Va. 480; Staunton etc. v. Haden 92 Va. 201; Wade v. Hancock 76 Va. 620; Snead v. Atkinson 121 Va. 182; Hill v. Woodward 78 Va. 765.

Having reached the conclusion that the judgment complained of was void and that it may be attacked by the trustee in bankruptcy (15 R. C. L. p. 661; Bankruptcy Act. Sec. 70), it follows that the plaintiff is entitled to the relief prayed for, unless he is estopped from having that to which he would ordinarily be entitled.

Counsel for defendant contends that the trustee is himself estopped from challenging the validity of the Litton judgment by reason of his filing the petition in the interpleader proceedings of October 3rd, 1934, asking for the payment to him of the remaining proceeds from the sale of the property under the Litton execution. Under different circumstances there would have been much force to this contention. But the attorney for the trustee was also the attorney for Litton. The petition for the trustee was filed after the validity of the Litton judgment had been challenged, by counsel for Jean McNeil Pepper. It is apparent from the record that counsel considered his first duty was to Scott Litton, by whom he had been first employed. It is also apparent that the trustee, who is a layman, had little knowledge as to the propriety of or as to the effect of the filing of this petition. Counsel who filed this petition for the trustee, refused to represent the trustee in the hearing attacking the Litton judgment by Jean McNeil Pepper, on account of his conflicting interests in representing Litton and the trustee. The same reason which would have prevented him from appearing at said hearing for the trustee and Scott Litton would it is thought deny to him the right to rely upon his act in filing said

petition as an estopped by the trustee to attack said judgment. 6 C. J. 619.

It is next contended by counsel for the defendant that Jean McNeil Pepper, being the only creditor whom the trustee represents in this proceeding, having elected to treat the Litton judgment as valid, her acts are as binding upon the trustee, as if she were actually seeking to maintain this proceeding in her own name (assuming that she could do so). In other words it is contended that Jean McNeil Pepper is the sole common creditor of the bankrupt. That she has elected to treat the Litton judgment as valid. That she is the real party in interest and that her acts are binding upon the trustee.

Counsel for the plaintiff, on the other hand contends:

(1) that this court has no right to consider the issue of election and estoppel sought to be raised by counsel for defendant and that to do so would be an infringement upon the prerogative of the Bankruptcy Court, (2) that there was no election by said creditor to treat said judgment as valid, (3) that the record does not show that she is the sole creditor represented by the trustee in bankruptcy, and (4) even if she is the sole creditor and even if she has made such election her acts are not binding upon the trustee and can not be considered in this proceeding.

(1) With reference to the first contention, it is thought, if an election has been made, affecting the right of the trustee to question the validity of said judgment it must be considered by this court in passing upon the issue here presented, if it is to be considered at all. The determination of the issues here presented was expressly referred to this court by the Bankruptcy Court, in discharging this duty this court does not undertake to pass upon the validity of any claim made or to be made against the bankrupt, nor to the disposition to be made of the assets of the bankrupt estate. But in order to determine the issue here presented, it is thought it should and must consider not only the facts appearing to have taken place at the time the judgment was attempted to be confessed, but also any perti-

nent subsequent acts of parties who might be estopped by their conduct from questioning the validity of said judgment. This court can not properly say the judgment complained of is void, if the parties now attacking it have heretofore said for their own benefit it was valid, or have elected to treat it as valid. In the absence of specific provisions of the bankruptcy laws governing the determination of the issues here presented, and I find none, the question is to be determined just as it would be, were no bankruptcy proceedings pending. It is thought the first contention of the plaintiff is without merit. 24 C. J. pages 362, 363. 23 C. J. pages 538, 542, 545.

(2) The second contention of counsel for plaintiff is likewise thought to be without merit. As heretofore stated it is thought the judgment rendered in favor of Scott Litton was a void judgment. The creditors, Jean McNeil Pepper had the right to treat it as void. But she also had the right to elect to treat said judgment as well as proceedings had under it as valid. Eubank v. Fuller, 156 Va. 635; Johnson v. Powhatan Mining Co. 127 Va. 352. The fund paid into court in the interpleader proceedings was derived absolutely from proceedings under the Litton judgment. If the judgment and execution thereon was to be attacked as void, then the fund derived from it could not be treated as valid fund for the payment of the obligations of the judgment debtor. Any undertaking to do this is a recognition of the validity of said fund and of the judgment and execution by which it was brought into being. In addition to the authorities cited in the brief of counsel, see Coral Gables Corp. v. Clay 153 Va. 564. It is thought, the creditor Jean McNeil Pepper has unequivocally manifested her intention of treating this fund as a valid fund. This necessarily amounts to a recognition of the validity of the judgment and execution, by her.

(3) As already stated it is thought the record in this case shows that Jean McNeil Pepper, executrix, is the sole creditor represented by the trustee in this proceeding. This court must decide this case upon the record as it now is. No opinion is expressed as to the rights of the trustee to attack the

Litton judgment, if other creditors should file claims in the bankruptcy proceeding. Such issue can be determined only when and if it should arise.

(4) Does the trustee in bankruptcy occupy such position that the issue here presented should be determined without regard to the conduct or actions of the creditor? It is true the title and rights of the trustee in bankruptcy are, under some circumstances, superior to those of the bankrupt and, likewise superior to those which some creditors may have. But after all he is the trustee for the creditors or as in this case, upon this issue, for the creditor. Moore v. Bowman 151 Va. 434. His interest and rights are nominal and technical. They, or as here, she, being the real party in interest. The issues in a case are to be determined according to the rights of the real parties in interest rather than by consideration merely the situation from the standpoint of the person in whose name the action may stand. Eastern State Hospital v. Graves 105 Va. 152, 153; City of Danville v. Howard 156 Va. 32, 7 C. J., p. 114. If the real party in interest, the creditor shall have said to the bankrupt or to another you have been guilty of a fraud or a wrong or have participated in a void transaction in creating a fund from the bankrupt's estate, but I will agree for the fund so derived to be used for the discharge of the bankrupt's indebtedness, the trustee it is thought being the representative of such creditor alone, cannot say I will avoid the transaction, take the property from which the fund was derived, convey it into money and pay it to said creditor. Generally speaking the rights of a trustee in bankruptcy are similar to the rights of other trustees, and he is, generally speaking governed by the same laws which would be applicable to other trustees. That trustee may be estopped from asserting rights which he would otherwise be entitled to assert by the acts and conduct of the cestui que trust, who is sui juris and bound by his election seems to be well settled by the decisions of courts. 65 C. J. pgs. 955, 979, 1008. This would seem to be obviously correct in the absence of any authority. That an election by one person is binding upon those claiming under the elector is well settled, a fortiori, it

would be binding upon one under whom the elector claims. Under the facts in this case it is thought the election of the creditor is binding upon the trustee. The creditor having elected to treat the Litton judgment as valid, the trustee can not for the sole benefit of said creditor, contend that it is void. The relief prayed for by the plaintiff will therefore be denied, and the motion will be dismissed at the plaintiff's cost.

This the 8th day of March, 1935.

A. G. LIVELY,
Judge."

ASSIGNMENTS OF ERRORS.

1. The Circuit Court erred in overruling plaintiff's motion to strike out defendant's plea, shown in the plaintiff's moion to that effect, filed in writing (Transcript page 21), and in overruling plaintiff's motion to strike out defendant's amended plea shown in plaintiff's motion to that effect, filed in writng, (Transcript page 39).

2. The Circuit Court erred in overruling plaintiff's motion to strike out defendant's evidence, made at the close of the defendant's evidence in chief (Transcript page 170), and renewed at the close of all the evidence (Transcript page 225).

3. The Circuit Court erred in holding that the plaintiff was bound by an alleged election of Jean McNeil Pepper to treat defendant's purported judgment as valid. (Exception No. 7, page 231.)

4. The Circuit Court erred in holding that Jean McNeil Pepper had elected to treat defendant's purported judgment as valid. (Exception No. 7, page 231).

5. The Circuit Court erred in ruling as inadmissible evidence showing that the defendant had purchased all general claims filed in the bankruptcy matter of Dixie Splint Coal Company, Inc., except Mrs. Pepper's claim therein, and in ruling as inadmissible evidence tending

to show why the defendant had purchased all of said claims. (Exceptions Nos. 5, 6, and 8, pages 229, 230 and 232).

6. The Circuit Court erred in allowing as admissible certain evidence of the witness, P. H. Smith, tending to show that if the claim filed by Mr. Smith as a preferred claim should be declared to be a general claim, he would withdraw same. (Exception No. 6, page 230).

7. The Circuit Court erred in allowing as admissible certain evidence of the witness, P. H. Smith, wherein he was allowed to read the minutes of the stockholders of the bankrupt corporation held on December 15, 1933. (Exception No. 9, page 233.)

8. The Circuit Court erred in dismissing plaintiff's action and refusing to declare to be void the judgment which the Court found to be void upon its face. (Exception No. 7, page 231).

ARGUMENT AND BRIEF.

The principal question presented by the case is the jurisdiction or competency of the Circuit Court of Russell County to inquire into the status of a bankruptcy proceeding, then pending in a court having original and exclusive jurisdiction of the matter, in an attempt to ascertain who were the creditors in the bankruptcy matter, who were general creditors and who preferred, and who among such creditors, if any, would derive any benefit or profit from a judgment of the Circuit Court of Russell County setting aside a void judgment against the bankrupt. The Circuit Court's judgment in this case rests upon the proposition that it did have such authority or jurisdiction and upon the finding of fact, made after such inquiry, that there was only one general creditor in the said bankruptcy matter and that this sole general creditor would be the only person to profit by the setting aside of the aforesaid void judgment. This question of law is determinative of the whole case, for if the Circuit Court had no such authority or jurisdiction the defendant's plea and amended plea should have been stricken out on plaintiff's motion to that effect and for the same reason the defendant's evidence would have

been stricken out and the case thereby ended in favor of the plaintiff. It is the plaintiff's contention that the Circuit Court exceeded its jurisdiction, and in addition the plaintiff contends that the Court's finding that there was only one general creditor in the bankruptcy matter is unsupported by the evidence.

The next question presented (assuming that the Court had jurisdiction to inquire into the matters mentioned and did find that there was only one general creditor in the pending bankruptcy matter) is whether the plaintiff herein the Trustee in Bankruptcy, was or could have been in such privity with the creditor, Mrs. Jean McNeil Pepper, that the plaintiff was bound by any previous election made by the creditor to treat the void judgment as valid or was estopped by anything that would estop said creditor to assert the invalidity of said void judgment. The plaintiff contends that this question should be answered in the negative, both as a matter of law and a matter of fact.

The further question raised (making the same assumptions as above) is the mixed question of fact and law whether the record shows any election on the part of Jean McNeil Pepper to treat the defendant's void judgment as valid and whether the record shows that she has taken such position in previous litigation that she would now be estopped to assert the invalidity of the said void judgment. The plaintiff contends that this question should likewise be answered in the negative. Therefore, on all or any one of the above grounds the Circuit Court's judgment in this case should be reversed.

The questions raised by the exceptions to the Circuit Court's rulings on admissibility of evidence will be discussed hereinafter.

The Circuit Court of Russell County Was Without Power or Jurisdiction to Inquire into the Status of the Bankruptcy Matter of Dixie Splint Coal Company, Inc., Bankrupt, then Pending in the District Court of the United States for the Western District of Virginia, in an Attempt to Determine Who Were the Creditors in said Matter, Whether or Not there was only One Gen-

eral Creditor, and Who of such Creditors Would Be Benefitted if the Judgment Attacked Were Found to be Void and set Aside.

The principle of the legal proposition above stated has been established by the Supreme Court of the United States in two cases, *Eau Claire National Bank v. Jackman, trustee, etc.* 204 *U. S.* 522, 27 *Sup. Ct.* 391, 51 *L. Ed.* 596, *affirming* 125 *Wis.* 465, 104 *N. W.* 98, 115 *A. S. R.* 955; and *Miller v. New Orleans Acid & Fertilizer Co.*, 211 *U. S.* 496, 29 *Sup. Ct.* 176 53 *L. Ed.* 300. The facts of both cases are closely analogous to those of the case at bar, and we submit that the principle involved in each of said cases is identical with that of the present case.

The first case cited was a suit by a trustee in bankruptcy in a Circuit Court of Wisconsin and against a national bank, having for its purpose the setting aside of an alleged unlawful preference obtained by the bank. From an adverse decision in the trial court the bank appealed to the Supreme Court of Wisconsin where the decision of the trial court was affirmed. Later, upon a writ of error, the bank had the case carried to the Supreme Court of the United States on the ground that a federal question was involved. Briefly, the facts were that John H. Young on February 10, 1902, then wholly insolvent, transferred a large portion of his property to the bank to secure a large indebtedness he owed it. On the following June 7th Young filed a voluntary petition in bankruptcy and upon it was adjudicated a bankrupt by the District Court of the U. S. for the Western District of Wisconsin. Later the trustee of his estate in bankruptcy brought suit in the Wisconsin court to recover the value of the property transferred to the bank on the ground that the transfer constituted an unlawful preference as defined by the Bankruptcy Act. The case was heard by a jury which found that Young was insolvent when he made the transfer, that the bank would receive a preference if it were allowed to retain the property, and that Young intended to give the Bank a preference. The trial court entered judgment accordingly, and the bank appealed to the Supreme Court of Wisconsin alleging an error, among other things, that the trial court was wrong in holding:

"(5) * that, in determining a question of preference, it was immaterial under the bankruptcy act, whether the bank and other creditors were of the same class, and in refusing to reverse the judgment because of error of the Circuit Court in charging the jury that all the creditors were of the same class. * *

(9) In holding that the bank was liable for the full value of the property received in an amount in excess of what was necessary to pay all the other creditors of the bankrupt, and the claims of fictitious creditors and claims of creditors who had themselves received preferences, and in not limiting the recovery to such sum as would be sufficient to pay the claims of creditors whose claims were provable."

As to these contentions the Supreme Court of Wisconsin held:

"Whether there was one or more classes of creditors, and in what manner the property sought to be recovered would, if the suit were successful, be administered, did not vary in the slightest degree the legal rights of the plaintiff. *If the property was obtained by the defendant in fraud of the bankruptcy act, the plaintiff was entitled to recover the same, and this is the only question involved.* (Italics inserted)."

As the report of the case shows, the Supreme Court of the United States awarded a writ of error, at the suit of the bank, on the ground that a federal question was at issue. In the Supreme Court of the United States the bank contested the above stated view of the Supreme Court of Wisconsin and contended that if this view were accepted that,

"* it would be impossible to ascertain whether or not the preference had been received without first determining the question of whether the enforcement of the transfer would enable the bank to recover a greater percentage of its debt than other creditors of the same class."

The bank also contended that,

"* * certain other claims were filed and allowed in the bankruptcy proceedings as preferred claims. These were probably claims for wages after the time of the transfers in question."

To the latter contention the Supreme Court of the United *State* said:

"In the list of claims referred to some only are marked preferred. But, granting that they all were, they were represented by the trustee."

The learned Court affirmed the Supreme Court of Wisconsin. We quote the conclusion of its holding, which, we submit, is in point with the issue of the present case now under discussion:-

"The bank also contends, in effect, that in such suit the validity of all other claims against the bankrupt can be litigated, and whether they have received voidable preferences and have not been required to surrender them. The broad effect of the contention repels it as unsound. To yield to it would transfer the administration of a bankrupt's estate from the United States district court to the state court."

The case of *Miller v. New Orleans Acid and Fertilizer Co., supra,* reached the Supreme Court of the United States in the same manner as the above quoted case, and is upon the same point. We quote from the opinion of the case:

"The questions then to be decided, are these:

1st was the trustee authorized by the bankruptcy law to avoid the sale to Miller to the extent of $3,000 which constituted the giving in payment under the state law? And 2nd, if so, was it incumbent on the trustee, under the bankruptcy, act, to such recovery to show the existence of individual creditors at the time the giving in payment to Miller took place, who were prejudiced thereby; and, if

not, was the trustee obliged to show the existence of individual creditors at the time of the adjudication in bankruptcy, who would be prejudiced in the distribution of the bankrupt estate if giving in payment to Miller was not annulled?"

In deciding upon the questions presented the Court held,—we quote from the opinion:

"While the power in the state court to pass on the question of preference involved the duty of deciding whether, at the time of the assailed transaction, there were creditors to be prejudiced, that duty did not involve ascertaining what creditors at the time of the adjudication in bankruptcy, were entitled to participate in the distribution. *The one was in the province of the state court for the purpose of the case before it; the other was a different question, depending on independent considerations exclusively cognizabl in the bankruptcy court. The state court was, therefore, right in so deciding.* (Italics inserted.)

Applying this rule to the case at bar, we might say that it was competent for the Circuit Court of Russell County to ascertain if there were any creditors whatever of the bankruptcy estate, but the question of what creditor or credits would profit by the success of the trustee in bankruptcy's suit was a question beyond the province of the Circuit Court and one exclusively cognizable in the bankruptcy court. We urge this Court's careful consideration of the two cases discussed, not merely because we believe that they are in point and persuasive, but because their decisions are controlling here on the points decided. On the point discussed see also the case of *Cartwright v. West*, 185 *Ala.* 41, 64, *So.* 293.

The Circuit Court of Russell County in attempting to determine that there was only one general creditor of the bankruptcy estate who alone would enjoy the benefit of the success of the present suit, has exceeded its jurisdiction.

THE JURISDICTION OF THE BANKRUPTCY COURT IS EXCLUSIVE.

Section 2 of the Bankruptcy Act (U. S. C. A. Title 11, Section 11) provides in part as follows:

> "That the courts of Bankruptcy as hereinbefore defined, viz: the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several Territories and possessions to which this act is, or may hereafter be, applicable, and the United States Court in the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers and during their respective terms as they are now or may be hereafter held to * * * (2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."

In construing this section of the Bankruptcy Act the Supreme Court of the United States has said:

> "We think it a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all "proceedings in bankruptcy" is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters, of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them." (*U. S. F. & G. Co. v. Bray*, 225 U. S. 205, 215, 56 *L. Ed.* 1055, 1062).

To the same effect is *U. S. v. Wood*, (*C. C. A. N. Y.*) 290 *F.* 109, affirmed in 263 *U. S.* 680, 68 *L. Ed.* 503.

The justice and wisdom of the Referee's order directing that the present suit be brought by the trustee is not subject to review or question in the state court, but only by appellate proceedings in superior federal courts. That proposition has been established by this Court in the case of *Russell v. Randolph et al*, 26 *Gratton* 705. In litigation in the State court it was contended that a certain order affecting the subject matter of the controversy had been entered in the Bankruptcy Court due to the contrivance of one party in the proceedings before the Bankruptcy Court. In the opinion by Staples this Court said:

> "It is the decree of a court having jurisdiction of the parties and the subject matter. It must be held as absolutely conclusive in every other court, unless it is impeached for fraud. * * * This court cannot disregard it upon mere suspicion, or even suggestion, that the United States court, in rendering this decree, was imposed upon by one of the parties."

B. The Circuit Court of Russell County Has Exceeded Its Jurisdiction And Power.

The learned Circuit Court in its opinion said:

> "The determination of the issues here presented was expressly referred to this court by the Bankruptcy Court. In discharging this duty this court does not undertake to pass upon the amount or validity of any claim made or to be made against the bankrupt, nor to the disposition to be made of the assets of the bankrupt estate."

The judgment of the Circuit Court, however, has undertaken and has done exactly what the learned trial Judge disclaims. The issue presented to the Circuit Court by the Bankruptcy Court was whether or not the defendant's judgment was void. The Circuit Court, upon the demurrer to plaintiff's motion found that the judgment was void on its face, and then proceeded to investigate what common and preferred claims had been filed, whether or not they were valid or would be withdrawn, who were the general creditors and how many,

and found that as between the defendant's and Mrs. Pepper's claim, the defendant's claim had priority.

We, therefore, submit that as a matter of law, the Circuit Court of Russell County, Virginia, was without jurisdiction and power to inquire into the status of the pending bankruptcy case of Dixie Splint Coal Company, Incorporated, in the District Court of the United States, in its attempt to ascertain who are the creditors, and whether or not there is one or more than one general creditor, and who will profit should the judgment attacked in this action be declared void. We further submit that the power to allow and disallow claims and to determine the status of claim, is a power exclusively within the jurisdiction of the Bankruptcy Court.

But assuming for the sake of argument that the trial court could exercise such broad power, let us examine into the evidence introduced in this case.

Mr. John Roberts, Referee in Bankruptcy, to whom the aforesadi bankruptcy case has been referred was introduced by the plaintiff and testified as follows:

> Q. Do your records show that Mr. Scott Litton has ever taken an assignment for the balance of that claim?
>
> A. I have not checked that with reference to Mr. Jones' claim. No, sir. There is no assignment attached to the proof of assigned claims, and I do not recall that it has ever been filed under a separate assignment.
>
> Q. Mr. Roberts, is it or not true, that the three claims just referred to are at least in part general claims?
>
> A. I think I have already stated the facts with reference to Grady Aistrop, and Russell Williams' claim.
>
> Q. State whether or not the residue of their claims is filed as a general claim?
>
> A. Yes, sir. (Transcript page 195, 196).

It is therefore, apparent that the trial court in rendering its judgment and stating in its opinion that there was only one general creditor of the bankrupt, was in error, and ignored the evidence of Mr. Roberts, Referee in Bankruptcy, who stated that a part of the claims filed

by Grady Aistrop, Russell Williams and A. C. Jones were general claims. At no point does the evidence show otherwise.

Mr. Roberts, Referee further testified as follows:

> Q. Mr. Roberts, is it now possible for you to judicially determine who have general claims, and who have preferred claims in the matter of Dixie Splint Coal Company, a bankrupt?
>
> A. The creditors still have further time within which to file claims, and these that have filed claims, I cannot determine until a hearing is had, after due notice, to the parties involved. (Transcript page 199).

Even after this evidence by the Referee in Bankruptcy, the trial court attempted to do exactly what the District Court of the United States said, was impossible at this time.

We, therefore, conclude that the trial Court should have sustained the plaintiff's motion to strike out the defendant's plea and amended plea, in part, wherein it was alleged that there was only one general creditor of the bankrupt estate and that any recovery had would be for her benefit; also the trial Court should have sustained the plaintiff's motions to strike out the defendant's evidence, in part, wherein the defendant failed to prove that there was only one general creditor of the bankrupt estate.

"Privity" Did Not Exist Between the Plaintiff, A Trustee in Bankruptcy, And Mrs. Jean McNeil Pepper, A General Creditor of the Bankrupt Estate.

The Circuit Court has held in this case that a trustee in bankruptcy is merely a representative of the *cestuis que trust*, or creditors of the bankrupt estate, and is much the same as any other trustee. This is an erroneous view of the nature of the office of a trustee in bankruptcy. He is more than a common law trustee; he is an officer of the bankruptcy court, an administrative officer whose title, rights and duties are expressly fixed and limited by the Bankruptcy Act itself. "Trustee"

is his title rather than his status. His title and rights to property are more extensive than the bankrupt's; he has in addition the rights of any particular creditor and by Sec. 47 of the Act he is erected into an "ideal" creditor, being given thereby rights that are not derived from any existing creditors. See *Remington on Bankruptcy, (3rd. Ed.), Vol. 4 Sec.* 1547. The trustee in bankruptcy's title and rights are said to be "the most extensive and complete of any in jurisprudence." See same text, sec. 1403; also, *Nusbaum v. City Bank & Trust Co.*, 132 *Va.* 54 110 *S. E.* 363.

In the very nature of the situation, we see that it is of necessity incorrect to say that the plaintiff, a trustee in bankruptcy, is in privity with Mrs. Jean McNeil Pepper, be she the only general creditor of the bankrupt estate or one of many such creditors.

> "Although it has been said that there is no definition of the term that can be applied to all cases, "privity", as most generally defined, and, as it has been said, in its broadest sense, denotes mutual or successive relationship to the same right of property. Also "privity" has been defined as a derivative kind of interest, founded upon, or growing out of, the contract of another; a *succesive* relationship to, or ownership of, the same property from a common source; a succession of relationships by deed or other act or by operation of law. Thus it has been said that privity implies succession; that privities occupy that relation to others because of derivative rights of property; * " 50 *Corpus Juris, p.* 403 *etc.*

The plaintiff's right to attack Scott Litton's void judgment was not derived from Mrs. Pepper; it was not a right of property held by Mrs. Pepper and succeeded to by the plaintiff by operation of law. As is pointed out in the next section of this brief, it is firmly established that any one, at any time, and in any court may assail a void judgment.

It might also be pointed out that the plaintiff did not in this case even use Mrs. Pepper's pending suits attacking the validity of the Litton judgment. He chose rather to institute a new and independent proceeding and adopted a type of procedure which probably could not

have been maintained by Mrs. Pepper or any other creditor but only by the bankrupt, judgment debtor in the judgment attacked. See *Wallop's Admr. v. Scarburgh*, 5 *Grattan* 1.

The fact that an incident of the plaintiff's success in the present action would be the probable benefit of Mrs. Pepper, who has filed a general claim in the bankruptcy matter can not serve to change the relationship between them. That is fixed by paramount law and would not and could not be changed by the filing or withdrawal of other general claims, the allowance, disallowance and reconsideration of claim in the bankruptcy matter. To hold otherwise would not only be illogical and contrary to established principles of law relating to the subject of privity, it would operate to strip the trustee in bankruptcy of rights and remedies given him by the Bankruptcy Act.

Jean McNeil Pepper, The Creditor Of The Bankrupt, Has Not "Elected" To Treat The Defendants Void Judgment as Valid.

Admitting, for the purposes of argument, that the Circuit Court did not exceed its jurisdiction and that privity in law actually existed between the plaintiff and Mrs. Pepper, it is submitted that the record will not support a finding that Mrs. Pepper has ever elected in any legal proceeding to treat defendant's judgment as valid one in such manner and in such circumstances that she would now be estopped to assert its invalidity. The lower court held that Mrs. Pepper by acknowledging in her answer in the interpleader suit that a third party, Clinchfield Coal Corporation, had a prior and unassailable lien upon the property of the bankrupt corporation which had been taken in execution upon defendant's void judgment, and by consenting to the entry of an order in said suit transferring the remainder of the proceeds of the execution sale, after the satisfaction of said prior lien, to the bankruptcy court to be there administered, that she thereby *recognized* the validity of the execution sale and hence "elected" to treat the void judgment as valid.

It is a firmly established principle in Virginia juris-

prudence that a void judgment is a mere nullity, neither binding nor barring anyone, and that it may be assailed at any time, in any court, by any one. A full score of cases can be cited for this proposition, but we will content ourselves with directing the Court's attention to only the following:

Beck vs. Semones' Adm'r., 145 *Va.* 429, 134 *S. E.* 677.

Hunt vs. Kennedy Coal Corp., 140 *Va.* 17, 124 *S. E.* 189.

Staunton Perpetual B. & L. Co. vs. Haden, 92 *Va.* 201; 23 *S. E.* 205.

Dillard vs. Central Va. Iron Co., 82 *Va.* 734, 1 *S. E.* 124.

Wade vs. Hancock, 76 *Va.* 620.

In the case just cited the Court, speaking through Burks, J., said: "A void judgment is *ex vi termini* a nullity, and may be so declared and treated by this court, and every other, when the validtiy or invalidity of the judgment is a question to be determined either in a direct or collateral proceeding."

The Staunton Perpetual B. & L. Co. case, *supra*, also laid down the rule that "if a judgment is void, no act of ratification can impart validity to it."

By a close division this Court held in the case of *Eubank vs. Fuller*, 156 *Va.* 635, 158 *S. E.* 884, that the parties to an action might by express agreement or contract, made in advance with full knowledge, agree to confirm a judgment to be entered in the future at a time when it would be void. This is the only case in Virginia in which a void judgment has for any reason or purpose, or as to any person, been treated as valid or binding. In that case the Court held:

> "When a party expressly consents and agrees to the entry of a void judgment, with full knowledge of its invalidity, accepts the benefits of it, accepts and treats it as valid and binding in all respects, he will not be permitted later to show its invalidity, for he is estopped. * *"

The many distinctions between that case and the present one are apparent. Mrs. Pepper did not consent to the entry of the void judgment; she had no knowledge of its entry at the time and was not a party to it. She has neither requested nor received any benefits under it. She has never affirmed or claimed that it was valid, nor has she "accepted or treated it as valid and binding in all respects". On the other hand, in every litigation to which she was a party Mrs. Pepper has expressly asserted the invalidity of the judgment. She can hardly be said to have been under a duty to attack the validity of the judgment and the execution sale in the interpleader suit in which she filed an answer. There was at that time pending in the same court a suit brought by her attacking the validity of the judgment, to which suit she made reference in her answer in the interpleader. Indeed, it has been held in such suits that a party who is claiming no interest in the property levied on cannot complain because the judgment on which the execution issued was void.

State vs. Tobin, 1 *Mo. A.* 186.
23 *Corpus Juris*, *p.* 319, *note* 82 (*a*).

By consenting to the entry of the order in the interpleader suit directing transfer of the proceeds of the execution sale, after satisfaction of the aforesaid prior lien of the Clinchfield Coal Corporation, to the bankruptcy court to be there administered, Mrs. Pepper "consented" to a proposition that had become established by the supreme law of the land, that is, that the bankruptcy court had acquired jurisdiction to administer said fund because of the intervening bankruptcy of the Dixie Splint Coal Co., the execution debtor, and that the Circuit Court of Russell County had lost such jurisdiction because of the same fact.

It is confidently submitted that the record in this case shows no election—as that word is used in such cases—on the part of Mrs. Pepper to accept and treat the void Litton judgment as valid.

It would be difficult to find a case precisely in point with the present one on all the facts, but the Court's attention is called to the case of *Peeples vs. T. W. Garrison & Son* 81 *S. E.* 116, 141 *Ga.* 411, 51 *L. R. A. (N. S.)* 635, which is illuminating on the point of estoppel on

the ground on previous inconsistent positions in litigation. In that case Garrison & Son foreclosed mortgage against Peeples, under the Ga. statute, and the Clerk of the Superior Court issued a *fi. fa.* thereon. The *fi fa* was levied on Peeples' horse by a constable of a Justice of the Peace Court. Under Georgia law the constable was an officer only of the Justice of the Peace court and process from a Superior Court could not be directed to him. Peeples filed what is known in Georgia as an "affidavit of illegality", denying therein the indebtedness on the mortgage, and gave the officer a forthcoming bond for the horse. The affidavit and the bond were returned to the Clerk's office of the Superior Court by the constable, and when the case came on for trial Peeples moved the court to dismiss the levy on the ground that same was void, the constable having no authority or jurisdiction under the law to levy the execution. Garrison & Son insisted that Peeples was estopped to make the motion because by denying the legality of the levy in the affidavit and in giving the forthcoming bond he had recited and acknowledged the factum of the levy. The trial court overruled Peeples motion and upon appeal the case was reversed upon this point. The Supreme Court of Georgia said: "The court erred in refusing to dismiss the levy. 'A levy by an officer without authority is no levy at all" (Citing cases)". The court went on in its opinion to point out the distinction between the *factum* of a levy and the *legality* of a levy. By admitting the factum of a levy one is not precluded from later showing that the levy was illegal and void.

The analogy between that case and the point raised in the present one is very strong. Mrs. Pepper by tacitly acknowledging the factum of the execution sale should not be estopped from later asserting the invalidity of the judgment from which the execution was issued. If the rule of the Georgia case is sound in reference to a mere process of a court, *a fortiori* it should be sound when applied to a judgment.

Nor can Mrs. Pepper be said to have "elected" to treat the Litton judgment as valid because she failed to prosecute to final judgment the chancery suit and the motion to set aside the judgment commenced by her in the Circuit Court of Russell County. The remedies sought by both the suit and the action were probably

not such as could be commanded by her as a judgment creditor of the debtor in the Litton judgment, and were therefore not inconsistent with the remedy sought in the present suit by the trustee in bankruptcy, or were rather no remedies at all in so far as she is concerned.

> "The essential elements of the doctrine of 'election of remedies' are (a) the existence of the two remedies; (b) the inconsistency between the remedies; (c) the choice of one of the remedies. If any one of these elements is absent, the result of preclusion does not follow, and the pursuit of a supposd, but non-existant, remedy does not constitute an election." *Henderson Tire & Rubber Co. v. Gregory* (*C. C. A. Mo.*) 16 *Fed.* (2*nd*) 589, 593, 49 *A. L. R.* 1503; *Words & Phases* (2*nd Ser.*) *Vol.* 2, *p.* 235; *Idem.* (3*rd Ser.*) *Vol.* 3, *p.* 154.

It has been held that where personal property is taken in execution, the court has no jurisdiction to enjoin the sale at the suit of a third party claiming a prior lien on the property so taken.

Bowyer v. Creigh, 3 *Rand.* 25.

It may also be *ponted* out that the bankruptcy of the judgment debtor occurred within about two and a half months after the institution of Mrs. Pepper's chancery suit, a time much shorter than that in which a chancery suit is usually ended.

Mrs. Pepper's motion to quash and set aside the Litton judgment was filed after the bankruptcy of the judgment debtor and for that reason alone possibly should not have been maintained by her; furthermore it was a type of action that probably could not have been maintained by her as a creditor of the judgment debtor.

Wallop's Adm'r. v. Scarburgh, supra.

ADMISSBILITY OF EVIDENCE.

Although the plaintiff believes, and insists, that the lower court's judgment should be reversed upon other grounds and that this Court should enter up final judgment in the case, the lower court's rulings on admissibility of evidence which were excepted to by the plaintiff will be discussed briefly having in view the possibility that this Court might remand the case and the same questions may be presented again. The objectionable rulings are set forth in plaintiff's exceptions numbered 5, 6, 8 and 9.

The exception shall involve virtually the same broad proposition. After the lower court had refused to strike out the defendant's plea and amended plea, it allowed evidence to be introduced by him tending to show that there was only one general creditor in the bankruptcy matter, Mrs. Jean McNeil Pepper. This was a part of the defendant's purported equitable defense, estoppel. Clearly, if an equitable defense were to be relied upon to defeat plaintiff's action at law, a wide latitude should have been allowed in throwing all the light possible upon the facts and circumstances preceding and *surrouning* the situation was *was* alleged to make it inequitable for the plaintiff to maintain his action. To be entitled to his equitable defense the defendant should come into court with clean hands, as the expression is, and show himself to be completely innocent and free from any questionable conduct. Or to put the prosecution the other way around, the plaintiff should have been permitted to introduce any evidence tending to show that the defendant had not acted in good faith in connection with facts leading up to the situation asserted by him to be the basis of his equitable defense, or more particularly, had deliberately attempted to bring about a situation calculated (as he thought) to deprive an innocent person of valuable rights and relief the enjoyment of the fruits of which were supposed to be secured to her by both the state and the federal laws. The defendant's own testimony which went into the record without objection shows that he tried to purchase all the general claims in the bankruptcy matter, save and except Mrs. Pepper's alone. Then he says in his plea that this creditor, because of *pervious* conduct on her part would not be estopped to maintain an action to set aside his void judg-

ment, and as she is the only general creditor in the bankruptcy matter that, therefore the trustee in bankruptcy is in privity with her and is likewise estopped. Can any good reason be suggested why the defendant should not be compelled to state his reasons for trying to purchase every general claim in the bankruptcy matter except this one creditor's? The lower court gave no reason and none is apparent. If the defendant purchased the claims with the sole purpose of trying to put the one creditor—, incidently, the largest one—, in such position that she would be automatically (according to defendant's theory) robbed of rights and remedies accruing to her and any other creditors by virtue of the supreme law of the land, he would most certainly not be in position to appeal to the conscience of a chancellor. In fact, his conduct, proof of which is in evidence, plainly shows that he has devised and attempted to carry out a scheme that amounts to using the bankruptcy court for the purpose of perpetrating a fraud upon the creditor mentioned. All evidence on that point should have been admitted and considered by the lower court. We submit, therefore, that the court erred when it refused to admit in evidence the defendant's answer to the plaintiff's question, "Why did you buy all the general claims except Mrs. Pepper's?" as set forth in plaintiff's exception No. 8.

As set forth in plaintiff's exception No. 5, the lower court even ruled as inadmissible the answer of a witness tending to show that the defendant did buy one of the general claims in bankruptcy that was withdrawn. For the reasons assigned above this was likewise erroneous.

After setting up as his purported equitable defense the alleged fact that there was only one general creditor in the bankruptcy matter the defendant attempted to show that if some of the claims filed as preferred claims were disallowed as such by the Referee and allowed as general claims (as they probably would be) that the claimants would withdraw them and refuse to receive dividends on them as general claims. To say the least such a proceeding would be sufficient to excite suspicion in any case, and certainly so here. The plaintiff objected to the introduction of such evidence and preserved the point in his exception No. 6. The lower court had no right under the pleadings, or otherwise, to institute an inquiry as to the future status of the claims filed

in the bankruptcy case. The defendant by his pleas had chosen to stand upon the situation in the bankruptcy case as it was at the time the present action was instituted and should not have been permitted to attempt to show what the situation might be at some other time.

> "Pleadings, as a rule, speak as of the time of the institution of the action, and general issues and special pleas, unless otherwise especially set forth, speak of of that date, hence matter arising after that date should be specially pleaded, though the plea would not be technically a plea *puis darrein continuance.* Neither payment nor any other matter arising since action brought, can be shown under the general issue, but must be pleaded specially either to further maintenance of the suit (action) or *puis darrien continuance.*" *Burks Pleading and Practice Third Ed., page* 570.

A transcript of the record of said judgment, with prepared index to same accompanies this petition.

Petitioner respectfully *request* that this petition be adopted and treated as his opening brief in the event that a writ of error is granted.

Petitioner on the 9th day of May, 1935, mailed a copy hereof to Ira M. Quillen, of counsel for the defendant.

Wherefore, petitioner prays that a writ of error be awarded to the judgment aforesaid, and that on a final hearing the said judgment be reversed and annulled, and judgment entered in favor of the petitioner, or at least a new trial be awarded.

P. H. SMITH, Trustee in Bankruptcy of the Estate of Dixie Splint Coal Company Incorporated, Bankrupt.

By Counsel.

C. W. HAMILTON,
Norton, Va.
M. M. HEUSER,
Norton, Va.,
Attorneys for Petitioner.

Received May 10th 1935.

P. W. C.

Virginia,
County of Wise, *to-wt*:

I, M. M. Heuser, an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that, in my opinion, the judgment complained of in the foregoing petition should be reviewed by the said Court.

Given under my hand, this 9th day of May, 1935.

M. M. HEUSER.

Writ of error awarded by order, June 17, 1935. Bond $500.00.

RECORD.

P. H. Smith, Trustee of the estate in Bankruptcy of Dixie Splint Coal Company, inc. Plaintiff

vs.

Scott Litton, Defendant.

Virginia,
County of Russell, to wit:

Pleas before the Circuit Court of Russell County at the Courthouse thereof, on 8th day of March, 1935.

Be it remembered that, heretofore, to-wit: On the 10th day of Jany., 1935, the plaintiff, P. H. Smith, Trustee of the estate in Bankruptcy of Dixie Sprint Coal Company, Inc., filed his motion to quash, etc., against the defendant, Scott Litton, which said motion is in the words and figures following:

In the Circuit Court of Russell County, Virginia.

To Scott Litton:

On June 2, 1933, P. H. Smith, as Secretary-Treas-
[2] urer of Dixie Splint Coal Company, Incorporated, attempted and purported to execute a confession of judgment for and on behalf of said corporation and in favor of you, the said Scott Litton, for the sum of Thirty-three *Thousnd* Four Hundred Sixty-eight and

89/100 (33,468.89) Dollars with interest thereon from said date until paid, and the costs incident to said confession of judgment; and on said date E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, attempted and purported to enter up a judgment in accordance with said purported confession of judgment, and docketed said purported judgment in his office, on said date, in Judgment Lien Docket No. 14, page 172, and also on said date caused to be entered in Common Law Order Book No. 20, page 60, of the aforesaid Court, an order reciting the aforesaid purported confession of judgment and the aforesaid purported entering up of judgment thereupon; and on June 2, 1933, there was issued upon said purported judgment a writ of fieri facias, directed to the Sheriff of Russell County and returnable at the 2nd July Rules, 1933; and on March 19, 1934, there was issued upon said purported judgment a second writ of fieri facias, directed to the Sheriff of Russell County and returnable at the first June Rules, 1934, and on June 1, 1934, there was issued upon said purported judgment a third writ of fieri facias, directed to the Sheriff
[2] of Russell County and returnable at the 1st September Rules, 1934; aforesaid proceedings and records are all of the proceedings and records in connection with the aforesaid purported confession of judgment, purported entry of judgment and execution thereof, in the aforesaid Clerk's Office and there is appended hereto and hereby made a part hereof a certified copy of the said purported confession of judgment marked "Exhibit Confession of Judgment, a certified copy of the said order, marked "Exhibit-Order of Judgment", and a certified copy of said purported judgment, marked "Exhibit-Judfment."

On September 7, 1934, aforesaid Dixie Splint Coal Company, Incorporated, was declared and adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, by the District Court of the United States for Western District of Virginia, and said bankruptcy matter ordered to be referred to John Roberts, Esq., one of the Referees in Bankruptcy of said Court, to take such further proceedings therein as are required by said Acts; thereafter P. H. Smith was elected Trustee of the estate in bankruptcy of said corporation, and duly qualified to perform the duties of said office; thereafter, on November 8, 1934,

the aforesaid Referee in Bankruptcy entered an order in said bankruptcy matter wherein it was provided and stated, *among* other things, that the selection of M. M. Heuser and C. W. Hamilton of Norton, Virginia, as counsel for the Trustee be approved and said counsel were *directed* to make investigation and advise the Trustee with reference to what proceeding, if any, should be instituted with reference to the aforesaid pur-
[3] ported judgment in favor of Scott Litton and against the bankrupt corporation; thereafter, on December 18th, 1934, upon the written report of aforesaid counsel, aforesaid Referee in Bankruptcy entered an order in said bankruptcy matter authorizing and directing the Trustee, by his said counsel, to institute an independent proceeding in the Circuit Court of Russell County, Virginia, for the purpose of contesting the validity of the aforesaid purported judgment and the execution thereof; and there is appended hereto and hereby made a part a certified copy of the aforesaid order of adjudication of bankruptcy, marked "Exhibit Order of Adjudication", a certified copy of the order approving the bond of the Trustee in Bankruptcy, marked "Exhibit-Order Approving bond", a certified copy of the excerpt of the aforesaid Referee's order of November 8, 1934, showing the matters hereinabove alleged, marked "Exhibit-Excerpt Referee's Order of November 8, 1934," and *an* certified copy of the aforesaid Referee's order on Dec., 18, 1934, marked "Exhibit-Referee's Order Authorizing Suit".

Notice is therefore hereby given you that on the 4th day of Feb, 1935 at 10:30 A. M., the undersigned Trustee of the Estate in Bankruptcy of Dixie-Splint Coal Company, Incorporated, will move the Judge of the Circuit Court of Russell County, Virginia, at his office in Lebanon, Va., to vacate, set aside and declare for naught the said purported judgment, and to quash the said execution thereof, and to henceforth restrain you your assigns or representatives, agents, servants or attorneys from evermore causing or attempting to cause further execution to be had upon said purported judgment; and to grant to the undersigned such other, further and general relief as the nature of this case may require, and for the following reasons:

(1) The said purported judgment is void ab initio, not having ever been confessed by the Dixie-Splint Coal Company, Inc., in the manner required by the statute in such case made and provided in that no power of attorney was ever executed by said corporation authorizing P. H. Smith to confess judgment, and no such power of attorney was ever filed in the Clerk's Office to be placed with the papers in said matter.

[4]

(2) P. H. Smith by virtue of his office as Secretary-Treasurer of said corporation did not have the implied power to confess said judgment; and had no such express power.

(3) The Clerk of the Circuit Court of Russell County had no authority, power or right to enter up and docket said purported judgment, the requirements of the statute in such case not having been complied with as stated in (1) above, and the Clerk being only a ministerial officer and agent of the said statute.

(4) The said writs of fieri facias are void, without any validity whatever, and nothing done thereunder is of any effect whatsoever, because the purported judgment upon which same were issued is a nullity for the reasons stated above.

Dated this the 31st day of December 1934.

P. H. SMITH,
Trustee of the Estate in Bankruptcy of Dixie Splint Coal Company, Incorporated, bankrupt,
By Counsel.

C. W. HAMILTON,
Norton, Virginia.
M. M. HEUSER,
Norton, Virginia.
Counsel.

Virginia:

In the Clerk's Office of the Circuit Court of the County of Russell.

[5]

I, Dixie Splint Coal Company, Incorporated, hereby acknowledge myself to be justly indebted to, and do

hereby confess judgment in favor of Scott Litton, in the sum of Thirty three thousand four hundred sixty eight and 89/100 ($33,468.89) Dollars, with interest thereon from the 2nd day of June, nineteen hundred and thirty three, until paid, and the costs of this proceeding.

Given under my hand and seal this 2nd day of June, nineteen hundred and thirty three.

DIXIE SPLINT COAL CO., INC.,
By P. H. SMITH,
Secretary & Treasurer.

DIXIE SPLINT COAL COMPANY,
INCORPORATED
(Seal)
1924
Virginia.

Virginia:

In the clerk's office of the Circuit Court of the County of Russell.

The foregoing judgment was duly confessed before me in my said office on the 2nd day of June, nineteen hundred and thirty three, at 2:30 o'clock p. m., and has been duly entered of record in common law order book number 20 page 60.

Teste:

E. F. HARGIS,
Clerk.

"EXHIBIT—CONFESSION OF JUDGMENT".

Virginia:

In the Clerk's Office of the Circuit Court of Rus-
[6] sell county, the 2nd day of June, 1935, at 2:30 o'clock, P. M.

Scott Litton, Plaintiff.
vs. Judgment Confessed.
Dixie Splint Coal Company, Incorporated, Defendant.

The defendant, Dixie Splint Coal Company, Incorporated, this day appeared in the Clerk's Office aforesaid, before the Clerk of said Court, by P. H. Smith, its Secretary and Treasurer, and waived service of process, orders at rules &c., and confessed judgment in favor of the plaintiff, Scott Litton, in the sum of $33,468.89, with interest thereon from the 2nd day of June, 1933, until paid, and the costs of this proceeding; it is therefore considered by the Clerk of said Court that the plaintiff, Scott Litton, recover of the defendant, Dixie Splint Coal Company, Incorporated, the said sum of $33,468.89, with interest thereon from the 2nd day of June, 1933, until paid, and the costs in this behalf expended on an open account.

Teste:

E. F. HARGIS,
Clerk.

Marginal Entry:

Judgment confessed June 2, 1933,
at 2:30 P. M.

"EXHIBIT-ORDER OF JUDGMENT."

Virginia:

In the Circuit Court of Russell, the 2nd day of June, 1933.

Scott Litton, Plaintiff,
vs. Action of Judgment confessed.
Dixie Splint Coal Company, Incorporated, defendant.

Judgment in favor of the Plaintiff against the Defendant for the sum of Thirty three thousand four hundred sixty eight and 89-100 (*$33,46.89*) Dollars with interest thereon from June 2nd, 1933, until paid, at the rate of six per centum per annum, and the costs of suit, $14.00. Subject to credit, viz: None.

A Fieri Facias issued from the Clerk's Office of said court on the 2nd day of June, 1933, returnable to the 2nd July Rules thereafter, *directed* to the Sheriff of the County of Russell who hath made return thereon in

the words and figures following, to-wit: .....

A Fieri Facias issued from the Clerk's Office of said Court on the 19th day of March, 1934, returnable to the 1st June Rules thereafter, directed to the Sheriff of the County of Russell who hath made return thereon in the words and figures following, to-wit: .....

A Fieri Facias issued from the Clerk's Office of said Court on the 1st day of June, 1934, returnable to the 1st September rules thereafter, directed to the Sheriff of the County of Russell who hath made return thereon in the words and figures following, to-wit: .....

This judgment was duly docketed in the Clerk's
[8] Office of the Circuit Court of the County of Russell on the 2nd day of June, 1933, at 2:30 o'clock P. M. in Judgment Lien Docket No. 14, page 172.

E. F. HARGIS,
Clerk.

Teste:

E. F. HARGIS,
Clerk.

.....

p. q.

"EXHIBIT JUDGMENT."

Virginia:

In the Clerk's Office of the Circuit Court of the County of Russell.

I, E. F. Hargis, Clerk of the Circuit Court of the County and State aforesaid, do hereby certify that the foregoing is a true and correct copy of the confession of judgment in the case of Scott Litton vs. Dixie Splint Coal Company, Incorporated; a copy of the order entered on the same and an abstract of the judgment, as the same appear of record in my office aforesaid.

Given under my hand and the official seal of said Court, at the courthouse thereof, on this the 5th day of January, 1935, and in the 159th year of our Commonwealth.

E. F. HARGIS,
Clerk of the Circuit Court of Russell County, Virginia.

Circuit Court of Russell County, Virginia
Sic Semper Tryannis

In the District Court of the United States:

For the Big Stone Gap Division, Western District
[9] of Virginia.

IN THE MATTER
Dixie Splint Coal Company No. 846 In Bankruptcy.
Bankrupt.

At Big Stone Gap, Virginia, in said District, on the 7th day of September, A. D. 1934 before the Honorable John Paul Judge of said Court in Bankruptcy, the petition of Dixie Splint Coal Company of Clinchfield in the County of Russell and District aforesaid that it be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said

Dixie Splint Coal Company

is hereby declared and adjudged a bankrupt accordingly.

It Is Therfore Ordered, That upon the petition filed in this Court by or against said bankrupt on the 4th day of September, A. D., 1934, said matter be referred to John Roberts, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Dixie Splint Coal Company shall attend before said Referee on the 14th day of September, 1934, at Norton and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said Dixie Splint Coal Co.'s bankruptcy.

Witness the Honorable John Paul, Judge of the said Court, and the seal thereof, at Big Stone Gap, Va., in said District, on the 7th day of September, A. D., 1934.

C. E. GENTRY,
Clerk.

By JOHN W. NEWMAN,
Deputy Clerk.

(SEAL OF THE COURT
District Court of the United States
SEAL

A Copy, Teste:

By JOHN W. NEWMAN,
Deputy Clerk.

[10] "EXHIBIT-ORDER OF ADJUDICATION".

In the District Court of the United States for the Western District of Virginia.

In the matter of
Dixie Splint Coal Company, Inc.) In Bankruptcy.
Bankrupt

At a court of bankruptcy held in and for the Western District of Virginia at Norton on this 3rd day of October, 1934, A. D., before John Roberts, Referee in Bankruptcy.

Whereas P. H. Smith of Clinchfield in said district has been duly appointed trustee of the estate of the above named bankrupt and has given bond with surety for the faithful performance of his official duties in the amount fixed by the court, to-wit: in the sum of Ten Thousand Dollars ($10,000.00), and such bond is satisfactory to the court; it is ordered that the said bond be, and it is hereby approved.

(Signed JOHN ROBERTS,
Referee in Bankruptcy.

District Court of the United States
SEAL

A Copy, Teste:

JOHN W. NEWMAN,
Deputy Clerk.

"EXHIBIT-ORDER APPROVING BOND."

In the District Court of the United States for the
[11)] Western District of Virginia.

In the matter of
Dixie Splint Coal Company, Inc., () In Bankruptcy
Bankrupt

At Norton, Vrginia, on the 8th day of November, 1934, before John Roberts, Referee in Bankruptcy.

At a hearing this day held pursuant to the notice of the referee given on the 3rd day of November, 1934, to the parties mentioned in the notice, said notice having been given after the filing of the petition of Scott Litton on the 3rd day of November, 1934, asking the referee to rehear a petition heretofore filed by Jean McNeil Pepper, and to review an order entered by the Referee on the 17th day of October, 1934, directing P. H. Smith, Trustee, to intervene in a certain suit pending in the Circuit Court of Russell County, Virginia, the object of same being to quash an execution issued by the clerk of the Circuit Court of Russell County on the judgment of Scott Litton against Dixie Splint Coal Company, Inc. Present: P. H. Smith, Trustee, I. M. Quillen and S. B. Quillen, counsel for Scott Litton; Joe L. Cantwell and H. G. Morison, Jr., of counsel for Jean McNeil Pepper

* * * * *

It is ordered that P. H. Smith, Trustee, return the check to E. F. Hargis, Clerk of the Circuit Court of Russell County that has been delivered to him by order of the Circuit Court of Russell County in the interpleader proceeding pending in said court and that the trustee hold in obeyance any further action under the order entered on September 26, 1934, until the further or-
[12] der of the referee.

It appearing that I. M. Quillen has resigned as counsel for the trustee in this matter and that the trustee needs counsel to advise him with reference to what, if any, proceeding should be taken with reference to the judgment of Scott Litton obtained in the Circuit Court of Russell County, Virginia, against the Dixie Splint Coal Company, it is ordered that the selection of M. M.

Heuser and his partner, C. W. Hamilton, as attorneys for the trustee be, and the same are hereby approved by the referee. It is further ordered that the said counsel give the matters involved in this case their prompt attention and that they file such petition on behalf of the trustee as they may deem advisable with reference to intervening in any matter that appears to be in controversy in this case.

* * * * * *

I, John Roberts, Referee in Bankruptcy, hereby certify that the foregoing is a true and accurate copy of excerpts, as same purports to be, of an order entered by me on November 8, 1934, in the bankruptcy matter of Dixie Splint Coal Company, Inc., the original of which said order is now filed in my office and in my custody as Referee in Bankruptcy.

Given under my hand this 7th day of January, 1935.

JOHN ROBERTS,
Referee in Bankruptcy.

"Exhibit-Excerpt Referee's Order of November 8, 1934."

In the matter of
Dixie Splint Coal Company, () In Bankruptcy
Bankrupt.

[13] At Norton, Virginia, on the 18th day of December, 1934 before John Roberts, Referee in Bankruptcy.

It appearing that Messrs. Hamilton and Heuser, attorneys for the Trustee, filed a petition in this matter on behalf of the trustee under date of November 27, 1934, asking for permission to institute a new and independent proceeding in the Circuit Court of Russell County, Virginia, for the purpose of testing the validity of a judgment confessed by the bankrupt corporation in favor of Scott Litton before the clerk of said court under date of June 2, 1933, for the sum of $33,468.89, with interest from June 2, 1933, and cost of $12.50, it appear-

ing from said petition that said judgment is probably void, and that a hearing was held before the Referee to consider said petition on the 8th day of December, 1934, at which time an answer was filed thereto by M. M. Long and I. M. Quillen, attorneys for Scott Litton, and that at that time the referee heard argument of counsel in the said petition and said answer and took time to consider the matter as to whether or not an order should be entered granting the prayer of the petition.

And it further appearing from the record in this case that the validity of said judgment is seriously questioned and that before an orderly administration of this estate can be had it will be necessary that the question as to whether or not the said judgment is a valid lien against the funds in the hands of the trustee in this matter and yet to come into the hands the trus-
[14] tee, and it further appearing that express exception to the validity of said judgment has been filed before the referee in bankruptcy since the hearing on December 8, and although there is a suit pending in the Circuit Court of Russell County, Virginia, instituted prior to the bankruptcy by Jean McNeil Pepper, which probably seeks a decision on the question of whether or not the said judgment is void and another proceeding was instituted by said Jean McNeil Pepper in said court since the bankruptcy seeking to have quashed any execution that may have been entered on said judgment, and it appearing from the petition of the attorneys for the trustee hereinabove mentioned that they deem it necessary and advisable that a new and independent proceeding be instituted in said Circuit Court of Russell County, Virginia, by the Trustee in Bankruptcy for the purpose of having tested the validity of the judgment and any execution that may have been issued thereon, it is ordered that the attorneys for P. H. Smith, Trustee, said M. M. Heuser and C. W. Hamilton, whose firm name is Hamilton and Heuser, proceed to institute such suit in the Circuit Court of Russell County, Virginia, in the name of P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Bankrupt, independent and separate from any suit that may now be pending in said court, as they shall deem necessary or advisable for the purpose of testing the validity of the judgment and any and all executions that have heretofore been issued thereon

and for any other purpose which they may deem necessary and advisable.

It is directed that the referee mail a copy of this order to the following: P. H. Smith, Trustee, Clinchfield, Va.; Scott Litton, Lebanon, Virginia; Hamilton
[15] & Henser, Attys., Norton, Va.; I. M. Quillen, Lebanon, Virginia; M. M. Long, St. Paul, Va.; Jean McNeil Pepper, Bristol, Virginia; Warren & Cantwell, Bristol, Va.; H. G. Morison, Atty., Bristol, Va.

JOHN ROBERTS,
Referee in Bankruptcy.

I, John Roberts, Referee in Bankruptcy, hereby certify that the foregoing is a true and accurate copy of an order entered by me on December 18, 1934, in the bankruptcy matter of Dixie Splint Coal Company, Inc., the original of which said order is now filed in my office and in my custody as Referee in Bankruptcy.

Given under my hand this the 7th day of January, 1935.

JOHN ROBERTS,
Referee in Bankruptcy.

"Exhibit-Referee's Order Authorizing Suit."

And on another day, to-wit:

On the 15th day of February, 1935, the follow-
[16] ing demurrer was filed.

Virginia:

In the Circuit Court of Russell County.

P. H. Smith, Trustee, Plaintiff,
vs. DEMURRER.
Scott Litton, Defendant.

The defendant, Scott Litton, by counsel, comes and demurs to the plaintiff's motion and says that the same is insufficient at law, for the following reason:

Each and all of the executions which the plaintiff seeks to quash are valid and subsisting and were issued pursuant to a judgment legally and validly confessed.

And on the same day, to-wit:

On the 15th day of February, 1935, the following [17] order was filed:

P. H. Smith, Trustee, Plaintiff,
vs. () PLEA.
Scott Litton, Defendant.

The defendant, Scott Litton, by counsel, comes and says that the plaintiff's action cannot be maintained for the following reasons, to-wit:

(1) Each and all of the executions which the plaintiff seeks to quash are valid and subsisting and were issued pursuant to a judgment legally and validly confessed.

(2) The plaintiff is estopped to maintain said action in that certain writ of fieri facias issued upon the defendant's judgment referred to in the plaintiff's motion, addressed to the Sheriff of Russell County, Virginia, under date of March 19, 1934, was upon that date delivered to the Sheriff of Russell County, Virginia, for execution and upon said date levied upon the tangible personal property of Dixie Splint Coal Company, Incorporated, pursuant to which said levy the said property of the Dixie Splint Coal Company, Incorporated was advertised for sale and sold by M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, long prior to the adjudication of the said Dixie Splint Coal Company, Incorporated, as a bankrupt; the proceeds of which said sale were delivered by M. C. Chafin, Deputy Sheriff as aforesaid, to E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, in an interpleader proceeding instituted by the said M. C. Chafin, Deputy Sheriff, in the Circuit Court of Russell County, Virginia, in which Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right; Scott Litton; and Clinchfield Coal Corporation as claimants [18] of the fund were impleaded for the purpose of determining to whom the said fund should be paid: in which said impleader proceeding the plaintiff, P. H. Smith, Trustee, pursuant to an order entered by Honor-

able John Roberts, Referee in Bankruptcy, under whose supervision the estate of Dixie Splint Coal Company, Incorporated, was being administered intervened by his petition filed therein and prayed for and procured the entry of an order by the Circuit Court of Russell County, Virginia, directing a portion of said fund derived from the aforesaid sale be paid to him, the said P. H. Smith, Trustee, to be administered by him in bankruptcy; in pursuance to which said order E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, drew and delivered to P. H. Smith, Trustee, his check for the portion of said fund which was ordered paid to the said P. H. Smith by the aforesaid order; by virtue of which said acts, the plaintiff P. H. Smith, Trustee, with full and complete knowledge of all facts and circumstances, relating to the said transaction, approved, recognized and confirmed the validity of the defendant's judgment and execution and sale made pursuant thereto and having, as aforesaid, treated the said judgment, execution and sale as valid cannot now be heard to assert its invalidity.

(3) The plaintiff, P. H. Smith, Trustee, is estopped to maintain said action because in his capacity as Trustee in Banpruptcy he represents only the interest of Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right, who is the only general creditor of the estate of Dixie Splint Coal Company, Incorporated, in Bankruptcy, and the creditor at whose instance the institution of this proceeding was ordered and the only creditor who would profit by a decision thereof in favor of the plaintiff and who has by her acts and conduct in relation to the subject matter of this litigation affirmed, ratified and acknowledged the *valdity* of the defendant's judgment and execution referred to in the motion; in that prior to the adjudication of Dixie Splint Coal Company, Incorporated, as a bankrupt and the qualification of P. H. Smith as Trustee of the estate she acquiesced in and approved the entry by the Circuit Court of Russell County, of a certain order in the said interpleader *proceding* instituted by M. C. Chafin, Deputy Sheriff, mentioned in paragraph two above, directing payment by the Clerk of said Court of a portion of the funds derived from the sale of the property of Dixie Splint Coal Company, In-

[19]

corporated, made pursuant to the levy of the defendant's execution, as above set out, paid to the Clinchfield Coal Corporation in satisfaction of a prior lien held by it against the said property and that by reason of her said ratification and acknowledgment of the validity of the defendant's judgment and execution she estopped herself to ever thereafter attack its validity in any action or suit brought by herself and that to permit the plaintiff to *pervail* in this action would be to allow the said Jean McNeil Pepper to establish and maintain indirectly a supposed remedy which she could not assert directly were she the *plaintaiff* in this action. And the defendant further says that for the same reason last above mentioned the plaintiff is estopped and should not *pervail* in this action because the said Jean
[20] McNeil Pepper further ratified, affirmed and acknowledged the validity of the defendant's judgment and execution in that she gave her consent and approval to the entry of an order made in the aforementioned interpleader proceeding by which the Clerk of the Circuit Court of Russell County, Virginia, was directed to pay to P. H. Smith, Trustee, the residue of the fund derived from the sale of the property of Dixie Splint Coal Company, Incorporated, made pursuant to the levy of the defendant's said execution.

And of this the said defendant is ready and able to verify.

SCOTT LITTON.

I. M. QUILLEN,
M. M. LONG, p. q.

And on another day, to-wit:

On the 18th day of February, 1935, the following
[21] motion to strike out defendant's plea was filed:

Virginia:

In the Circuit Court of Russell County.

P. H. Smith, Trustee of the Estate
in Bankruptcy of Dixie-Splint Coal
Company, Incorporated,
vs. MOTION TO STRIKE OUT SPECIAL PLEA.
Scott Litton

Comes the Plaintiff, by counsel and moves the court to strike from the Defendant's Special Plea, heretofore filed herein, paragraph one (1) thereof, because the question thereby attempted to be raised and presented is the sufficiency in law of Plaintiff's Motion to Abate and Quash, which said question has heretofore been determined by the court upon Defendant's general demurrer.

The Plaintiff moves to strike out paragraph two (2) of said Special Plea because same attempts to set up and assert an estoppel and does not allege or aver, either expressly or by fair intendment or implication, fact or facts necessary to afford the basis of an estoppel, that is, that the person asserting the estoppel, the Defendant, ever was deceived or mislead by, changed his position because of, or relied to his legal detriment or prejudice upon, the alleged action of the Plaintiff in receiving a portion of certain funds involved in the interpleader suit mentioned in said Special Plea; also because said paragraph two (2) in effect and by implication attempts to contradict the records of the District Court of the United States For The Western District of Virginia which have been vouched by Plaintiff's Motion to Abate and Quash (Exhibit "Excerpt Referee's Order of November 8, 1934") and which set forth and shows
[22] that the Plaintiff herein not only received the portion of funds hereinabove mentioned, but that he promptly returned same and did not ever and does not now enjoy the benefit or use of said funds. Such contradiction of the authenticity, purpose or sense of records properly vouched can be attempted and effected only by plea of Nul Tiel Record.

The Plaintiff moves to strike out paragraph three (3) of said Special Plea because the matters therein alleged are totally irrelevant to the issues presented in this proceeding; also because under established rules of comity it is unecessary, improper and erroneous for this court to enter upon an inquiry of the reasons, or the lack thereof, the motives, policy or effect of the judgments, orders and decrees of The District Court of the United States in directing a Trustee in Bankruptcy to intervene in or institute a proceeding in this court, the question of said court's jurisdiction in the premises being the only one open to investigation and inquiry here; also because it appears from the records of said United States court, vouched and set forth by duly authenticated copies of

the records of the proceedings in Bankruptcy therein (Exhibit-"Order of Adjudication") that it is inherently inaccurate and inconclusive to assert, as is done in paragraph three (3) of said Special Plea, that there is only one general creditor of the Estate in Bankruptcy of Dixie-Splint Coal Company, Incorporated, there yet remaining time in which proofs of claim may be filed in said bankruptcy matter; also because no action or conduct by a third person, such as is alleged in said paragraph three (3) of said Special Plea, and under whom the Trustee in Bankruptcy is not claiming, can work
[23] an estoppel to prevent the Trustee from exercising rights and performing duties which inhere in his office by virtue of the supreme law of the land.

The Plaintiff moves to strike out all of said Special Plea because same is unresponsive, irrelevant, inconclusive, and improper in form.

P. H. SMITH, Trustee, etc.,
By Counsel.

HAMILTON & HEUSER, p. q.

[24] EXCEPTION NO. 1.

The plaintiff, by counsel, moved the Court to strike out the plea of the defendant, and filed said motion together with grounds therefor in writing, which is a part of the record; but the Court overruled said motion to strike out said plea, to which action of the court the plaintiff, by counsel, then and there duly excepted.

Teste: This 23rd day of April, 1935.

A. G. LIVELY,
Judge.

And on another day, to-wit:

On the 21st day of February, 1935, the following
[25] amended plea was filed:

Virginia:

In the Circuit Court of Russell County.

P. H. Smith, Trustee, Plaintiff,
vs. () AMENDED PLEA.
Scott Litton, Defendant.

The defendant, Scott Litton, by counsel comes and says that the plaintiff's action cannot be maintained for the following reasons, to-wit:

(1) Each and all of the execution which the plaintiff seeks to quash are valid executions issued pursuant to a valid judgment; the validity of which is recognized and confirmed by the judgment debtor, Dixie Splint Coal Company, Incorporated, and has been acknowledged as a matter of record by the plaintiff and his privies in interest.

(2) The plaintiff is estopped to maintain said action in that a certain writ of fieri facias issued upon the defendant's judgment referred to in the plaintiff's motion, addressed to the Sheriff of Russell County, Virginia, under date of March 19, 1934, was upon that date delivered to the Sheriff of Russell County, Virginia, for execution and upon said date levied upon all the tangible personal property of Dixie Splint Coal Company, Incorporated; pursuant to which said levy the said property of the Dixie Splint Coal Company, Incorporated, was advertised for sale and sold by M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, long prior to the adjudication of the said Dixie Splint
[26] Coal Company, Incorporated, as a bankrupt; the proceeds of which said sale were delivered by M. C. Chafin, Deputy Sheriff as aforesaid, to E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia in an interpleader proceeding instituted by the said M. C. Chafin, Deputy Sheriff, in the Circuit Court of Russell County, Virginia, in which Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right; Scott Litton, and Clinchfield Coal Corporation as claimants of the fund were impleaded for the purpose of determining to whom the said fund should be paid; in which said interpleader proceeding the plaintiff, P. H. Smith, trustee pursuant to an order entered on the 26th day of September, 1934, by Honorable John Roberts, Referee in Bankruptcy, under whose supervision the estate of Dixie Splint Coal Company, Incorporated, was being administered, intervened by his petition filed therein and prayed for and procured the entry of a final order by the Circuit Court of Russell County, Virginia, directing a portion of said fund derived from the afore-

said sale be paid to him, the said P. H. Smith, Trustee, to be administered by him in bankruptcy; in pursuance to which said order E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, drew and delivered to P. H. Smith, Trustee, his check for the portion of said fund which was ordered paid to the said P. H. Smith by the aforesaid order; by virtue of which said acts, the plaintiff, P. H. Smith, Trustee, with full and complete knowledge of all facts and circumstances relating to the said transaction, approved, recognized and confirmed the validity of the defendant's judgment
[27] and execution and sale made pursuant thereto and having, as aforesaid, treated the said judgment execution and sale as valid cannot now be heard to assert its invalidity.

(3) The plaintiff, P. H. Smith, Trustee, is further estopped to maintain this action because in his capacity as Trustee in Bankruptcy he is in privity with and bound by the actions of Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, who is the only general creditor of the estate of Dixie Splint Coal Company, Incorporated, in bankruptcy, the creditor at whose instance the institution of this proceeding was ordered and the only creditor of the estate who desires or would profit by a decision in this action in favor of the plaintiff, and who prior to the aforesaid sale made by M. C. Chafin, Deputy Sheriff, instituted a suit in chancery in the Circuit Court of Russell County, Virginia, asserting the defendant's judgment to be void and any sale made upon execution issued pursuant thereto to be a nullity and that a purchaser at such sale would receive no valid title and praying that the said judgment be declared void and the proposed sale of said property by M. C. Chafin, Deputy Sheriff, be restrained, but who notwithstanding this fact abandoned her said plea for an injunction restraining said sale and permitted same to be made without objection upon her part; at which said sale Scott Litton, as agent for Dixie Beaver Coal Company, Incorporated, became the purchaser of the said property at the price of $3200.00, which he paid to the said M. C. Chafin, Deputy Sheriff, in cash; and for the further reason that the said Jean Pepper, Executrix,
[28] prior to the adjudication of Dixie Splint Coal Company, Incorporated, as a bankrupt, with full

knowledge of all the facts expressly as a matter of record acquiesced in and approved the entry by the Judge of the Circuit Court of Russell County, Virginia, of a certain order in the aforementioned interpleader proceeding instituted by M. C. Chafin, Deputy Sheriff, directing payment by the Clerk of said Court of $2150.00 of the funds derived from said sale to Clinchfield Coal Corporation in satisfaction of a prior lien held by it against the said property and which said sum was accordingly paid to the said Clinchfield Coal Corporation pursuant to said order and prior to the adjudication in bankruptcy and the plaintiff's qualification as Trustee; and for the further reason that the plaintiff's privy, Jean McNeil Pepper, Executrix, as a matter of record expressly approved and ratified the validity of the defendant's said execution by subscribing to an agreed order entered in the said interpleader proceeding directing the residue of the proceeds of said sale paid to the plaintiff to be administered in bankruptcy in pursuance of which said order the remainder of said fund was paid to the plaintiff, all of which said acts of the plaintiff's said privy amounts to an *unequivocally* admission of the validity of the defendant's said judgment and execution which would serve to estop her to assert their invalidity were she the plaintiff in this action, and to permit the plaintiff to recover in this action would be to permit his said privy, Jean McNeil Pepper, Executrix, to assert and establish indirectly a right which she could not establish directly. The defendant further says that
[29] the plaintiff is estopped because of the fact that the Clinchfield Coal Corporation, and the purchasers of said property at the execution sale relying upon the aforesaid supposed approval thereof by the plaintiff and his said privies have so changed their positions in relation to the said transaction that they nor neither of them can now be placed in statu quo and would be *deterimently* effected by a decision in this case in favor of the plaintiff in as much as the Clinchfield Coal Corporation having received satisfaction of its lien by common consent of all parties in interest has commingled said funds with its other assets and the said funds paid to it cannot now be recovered from it, and the Dixie Beaver Coal Company, Incorporated, the present owner of said property, in reliance on the aforesaid acts of approval of said sale have made extensive expenditures

in repair and improvements on the property purchased by it and could not now be placed in statu quo for this and for the further reason that, as aforesaid, the purchase price paid by it has been dissipated and could not be refunded to it as would be its right in the event the said sale was voided.

(4) The plaintiff is further estopped to maintain this action for the reason that in his capacity as Trustee he is in privity with and represents the interests of Dixie Splint Coal Company, Incorporated, which said Corporation prior to its adjudication in bankruptcy and since has at all times treated and regarded the defendant's judgment and execution as valid and has at all times,
[30] with full knowledge of all the facts expressly consented to the sale of said property and the distribution of the proceeds of said sale as hereinabove set out by reason of which it could not as the plaintiff in such an action as this be heard to assert that the defendant's judgment and execution are void.

And this the defendant is ready and able to verify.

SCOTT LITTON, By Counsel.

M. M. LONG,
I. M. QUILLEN.

And on the same day, to-wit:

On the 21st day of February, 1935, the following
[31] plea was filed:

Virginia:

In the Circuit Court of Russell County.

P. H. Smith, Trustee of the estate, in Bankruptcy, of Dixie Splint Coal Company, Inc., Plaintiff
vs.
Scott Litton, Defendant.

The Plaintiff, not waiving or abandoning his motion to strike out defendant's plea or his motion to strike out the defendant's amended plea, but relying and insisting upon said motions, comes and says:

That he denies each and every allegation in said plea, and each and every allegation in said amended, plea, and calls upon the defendant for strict proof thereof.

P. H. SMITH,
P. H. SMITH, Trustee, &c.

HAMILTON & HEUSER, p. q.

[32] CERTIFICATE NO. 2.

The plaintiff, by counsel, moved the Court to strike out the amended plea of the defendant, and filed said motion, together with grounds therefor, in writing, which is a part of the record, but the Court overruled said motion to strike out said amended plea, to which action of the Court the plaintiff, by counsel, then and there duly excepted.

Teste: This 23 day of April, 1935.

A. G. LIVELY,
Judge.

And on the same day, to-wit:

[33] On the 21st day of February, 1935, the following petition of Dixie Beaver Coal Company, Inc., and Scott Litton, was filed for identification:

Virginia:

In the Circuit Court of Russell County:

P. H. Smith, Trustee, Plaintiff,
vs. Petition of Dixie Beaver Coal Company, Inc & Scott Litton
Scott Litton, Defendant.

To the Honorable A. G. Lively, Judge.

Your petitioners would respectfully show unto the Court as follows:

That your petitioner, Dixie Beaver Coal Company,

Incorporated, is a corporation chartered and doing business under the laws of the State of Virginia, with its principal office at Clinchfield, Virginia:

That there is now pending in Your Honor's Court a certain action at law, to-wit: a motion to quash certain executions instituted by P. H. Smith, Trustee of the Estate of Dixie Splint Coal Company, Incorporated, in bankruptcy against Scott Litton as defendant, in which said action the interests of your petitioners are involved and may be vitally affected by the outcome thereof;

That pursuant to a certain execution issued from the Clerk's Office of Russell County, Virginia, on the 19th day of March, 1934, upon a judgment in favor of Scott Litton against Dixie Splint Coal Company, Incorporated, which is referred to in plaintiff's motion, M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, after due advertisement offered for sale at public auction all of the tangible personal property and mining equipment of the Dixie Splint Coal Company, Incorporated, to satisfy the lien of the said execution, at which said sale your petitioner, Scott Litton, as
[34] agent for your petitioner, Dixie Beaver Coal Company, Incorporated, which was at that time in process of incorporation and whose application for a charter was then pending before the Corporation Commission became the purchaser of said property at the price of $3200.00;

That prior to the said sale Jean McNeil Pepper, Executrix, a creditor of Dixie Splint Coal Company, Incorporated, had instituted a suit in chancery in the Circuit Court of Russell County, Virginia, alleging the said judgment in favor of Scott Litton to be void and that any sale pursuant thereto would be void and praying that the court restrain the said sale of said property by M. C. Chafin, but notwithstanding this fact the said Jean McNeil Pepper, Executrix, abandoned her plea for such an injunction and permitted the said sale to be made by the Sheriff without objection upon her part;

That your petitioner, Scott Litton, agent for your petitioner, Dixie Beaver Coal Company, Incorporated, paid to M. C. Chafin, Deputy Sheriff, in cash the full amount of the purchase price of said property purchased by him, which said amount the said M. C. Chafin in turn

paid to E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, pursuant to an order of said court in an interpleader proceeding instituted by him in which Scott Litton, Jean McNeil Pepper, Executrix, and Clinchfield Coal Corporation were made parties defendants and required to litigate their respective rights in the proceeds of said sale;

That your petitioner are advised that the Clinchfield Coal Corporation held a paramount lien against the said property sold as aforesaid by virtue of the [35] terms of a certain lease executed between said Clinchfield Coal Corporation as lessor and Dixie Splint Coal Company, Incorporated, as lessee, of the existence of which said lien the said Clinchfield Coal Corporation advised the said M. C. Chafin, Deputy Sheriff, and demanded of him satisfaction thereof out of the proceeds of said sale;

That at the time of said sale the said Jean McNeil Pepper, Executrix, claimed to be the holder of an execution lien against the said property by virtue of an execution issued pursuant to a certain judgment rendered in her favor by the Corporation Court of the City of Bristol;

That the said Jean McNeil Pepper, Executrix, appeared in the said interpleader proceeding above mentioned and by her answer expressly admitted the priority of the lien asserted by Clinchfield Coal Corporation and with full knowledge of all facts expressly agreed and acquiesced in the entry of an order by the court directing the amount of said Clinchfield Coal Corporation's lien in the sum of $2150.00 paid to it, which said payment was made by E. F. Hargis, Clerk of the Circuit Court of Russell County, pursuant to said order by A. K. Morison, general counsel for the Clinchfield Coal Corporation, who was likewise counsel for Jean McNeil Pepper, Executrix, both in the chancery suit and interpleader proceeding above mentioned, which said payment was made on the .... day of ....., 1934, long prior to the adjudication of Dixie Splint Coal Company, Incorporated, as a bankrupt;

That subsequent to the qualification of P. H. Smith, Trustee of the estate of Dixie Splint Coal Company, Incorporated, in bankruptcy, he, by his petition filed in the said interpleader proceeding pursuant to the order

of the Referee under which he was acting, with
[36] full knowledge of all the facts and prayed that the residue of the proceeds of the sale to your petitioners be paid to him to be administered in bankruptcy, and pursuant to the prayer of his said petition, by and with the expressed consent and approval of Jean McNeil Pepper, Executrix, an order was entered by the court directing the residue of said fund paid to said P. H. Smith, Trustee, which said order neither P. H. Smith, Trustee, nor Jean McNeil Pepper, Executrix, have ever asked to have set aside.

That your petitioner, Dixie Beaver Coal Company, Incorporated, is now the owner of the property bid in by its agent, Scott Litton, at the aforesaid sale;

That to now have declared void the said execution under which the property was sold and the sale made to your petitioners would seriously and vitally affect the rights of your petitioners in the premises for the following reasons:

First: because your petitioners relying upon the abandonment by Jean McNeil Pepper, Executrix, of her prayer for an injunction restraining the said sale and the further action of the said Jean McNeil Pepper, Executrix, in expressly approving payment of a portion of the proceeds thereof, to the Clinchfield Coal Corporation as a ratification and approval of the said execution and sale, your petitioners have expended approximately the sum of $3000.00 in repair and improvements on the said property purchased by it at said sale;

Second: your petitioners are advised and aver that should the said sale to them be voided, they cannot be placed in statu quo for the reason that the pro-
[37] ceeds of said sale have been already disbursed and dissipated and the purchase price paid by your petitioners could not now be refunded to them as would be their right under said circumstances;

Third: because the stockholders of the Dixie Splint Coal Company, Incorporated, prior to the adjudication of said Corporation as a bankrupt and prior to the accrual of the supposed lien claimed by Jean McNeil Pepper, ratified and confirmed the confession of said judg-

ment by its Secretary and Treasurer, P. H. Smith and further prior to its adjudication as a bankrupt, with full knowledge of all facts, expressly approved the sale of said property and the disbursement of the proceeds in the manner above set out.

Your petitioners say that on account of the foregoing facts the plaintiff in this action is estopped and cannot now be granted the relief sought in said action in as much as the Trustee in Bankruptcy in his capacity as such takes the estate of the bankrupt in the condition in which he finds it at the time of his qualification and has no privilege to assert any rights with reference to the affairs of the estate which could not have been asserted by the bankrupt before adjudication or by a creditor especially where, as in this case, such asserted remedy would detrimentally affect the interest of a third party, which is more specially true in this case in that Jean McNeil Pepper, Executrix, is sole and only general creditor of the estate and the only creditor who would profit by an avoidance of said sale and the creditor at whose instance this action was instituted;

[38] Your petitioners say that the plaintiff himself as Trustee in Bankruptcy is further estopped because of the fact that he has affirmatively and as a matter of record in the interpleader proceeding affirmed the validity of said sale by asking for and receiving a portion of the proceeds thereof;

Your petitioners pray, therefore, that they be permitted to be joined as parties defendant in this action and that this petition be received and treated as their plea, answer or defense to the cause of action asserted by the plaintiff and that no order be entered in this action to their prejudice.

Respectfully submitted,

DIXIE BEAVER COAL COMPANY, INC.,
SCOTT LITTON,

By Counsel.

M. M. LONG.
I. M. QUILLEN.

And on the same day, to-wit:

On the 21st day of February, 1935, the following
[39] motion to strike out the defendant's amended plea was filed:

Virginia:

In the Circuit Court of Russell County.

P. H. Smith, Trustee of the Estate in Bankruptsy of Dixie Splint Coal Company, Incorporated,

vs.

Scott Litton.

The plaintiff comes and craves oyer of the record in the interpleader proceeding instituted by the said M. C. Chafin, Deputy Sheriff, in the Circuit Court of Russell County, Virginia, in which Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right; Scott Litton, and Clinchfield Coal Corporation were impleaded, in the defendant's plea and answer mentioned, which, being read to him, is in the following words, to-wit:

(Which said record is set out in full in the transcript of the evidence, beginning at page 84).

and thereupon the plaintiff moves the court to
[39-a] strike from the defendant's said plea and answer paragraph (1) thereof, because the questions thereby attempted to be raised and presented are as to the sufficiency in law of plaintiff's Motion to Abate and Quash, which said questions have heretofore been determined by the court upon defendant's general demurrer; and also because of the reasons hereinafter assigned for striking out paragraph (2) of said plea and answer.

The plaintiff moves to strike out paragraph (2) of said plea and answer because same attempts to set up and assert an estoppel against the plaintiff to prosecute this action, but does not allege or aver, either expressly or by fair intendment or implication, facts necessary to constitute the basis of an estoppel, that is, that the

person asserting the estoppel was ever deceived or misled by, changed his position for the worse, because of, or relied to his legal detriment or prejudice upon the alleged action of the plaintiff in receiving a portion of certain funds involved in the interpleader suit mentioned in said paragraph; also because the records of the District Court of the United State for the Western District of Virginia which have been properly vouched by plaintiff's Motion to Abate and Quash (Exhibit-Excerpt Referee's Order of November 8, 1934), not herein contradicted by defendant's plea of Nul Tiel Record, and the records of the aforesaid interpleader suit herein read, are at variance with the allegation of said paragraph (2) of defendant's plea and answer that the plaintiff, "with full and complete knowledge of all facts and circumstances relating to the said transaction, approved, recognized and confirmed the validity of the defendant's judgment and execution and the le made pursuant thereto."

[39-b] The plaintiff moves to strike out paragraph (3) of said plea and answer because the matters therein alleged are totally irrelevant to the issues presented in this proceeding; also because under established rules of comity binding upon this court it will not and should not enter upon an inquiry to ascertain the reasons, or the lack thereof, the motives, policy, wisdom or effect of the judgment and order of the District Court of the United States for the Western District of Virginia in directing the plaintiff to institute this proceeding in this court, that said court's jurisdiction of both the subject matter and the parties being unquestioned; also because it affirmatively appears from the records of said United States court, properly vouched in plaintiff's Motion to Abate and Quash (Exhibit-Order of Adjudication), the authenticity of which is not raised by plea of Nul Tiel Record, that it is inherently inaccurate and meaningless to now assert, as is done in paragraph (3) of defendant's plea and answer, that there is only one general creditor of the estate in Bankruptcy of Dixie Splint Coal Company, Incorporated, there yet remaining time in which general claims may be filed in said bankruptcy matter, and because it is not alleged in said paragraph (3) that the one mentioned general claim has ever been allowed and approved for payment of dividends in said bankruptcy matter; also because no action, conduct or representation by a third person, under

whom the Trustee in Bankruptcy is not claiming, can serve as a basis for an estoppel to prevent and debar the Trustee in Bankruptcy from asserting rights and performing duties which inhere in his office by virtue of the supreme law of the land; also because said paragraph asserts as a basis for the estoppel therein claimed against plaintiff, reliance upon and incurred detriment by persons other than the defendant who is asserting
[39-c] and claiming the estoppel, such facts, if true, affording no basis for an estoppel against plaintiff; also because all purchasers at a judicial sale or sale under execution are subject to the rule of caveat emptor.

The plaintiff moves to strike out paragraph (4) of said plea and answer because the records herein read are at variance with the allegation in said paragraph that the plaintiff "has at all times, with full knowledge of all the facts, expressly consented to the sale of said property and the distribution of the proceeds of said sale"; and also because the plaintiff as a *Truste* in Bankruptcy has rights the bankrupt *could* have been estopped to assert, even if the bankrupt in this case would have been estopped to assert the invalidity and illegality of the judgment in question; Also because said paragraph (4) contains no allegation that the defendant herein, Scott Litton, has been misled or caused to change his position for the worse because of plaintiff's or plaintiff's privies' alleged treatment and regard of said judgment as valid.

The plaintiff moves to strike out each and every paragraph of said plea and answer and all of said plea and answer because same is unresponsive, irrelevant, inconclusive and improper in form.

P. H. SMITH,
Trustee of the Estate in Bankruptcy of Dixie Splint Coal Company, Incorporated,
By Counsel.

Mr. Heuser states that they do not desire to in
[40] troduce any evidence for the plaintiff:

By I. M. Quillen:

Counsel for plaintiff have stated that they do not de-

sire to introduce any proof. We desire to move to dismiss the action for want of proof to establish plaintiff's allegations.

By the Court:

Motion to dismiss is overruled.

Exception saved.

By I. M. Quillen:

Now, Your Honor please, in so far as proceeding with the evidence we are ready to proceed with the *evience*, but by doing so we expressly state that we do not waive the motion to dismiss the action for lack of evidence.

By I. M. Quillen:

Your Honor please, we take exceptions to the ruling of the Court in granting oyer to the interpleader proceedings on the ground, first, that it is not in the possession of the defendant; second, because the instrument or instruments on which oyer has been granted are not deeds or instruments under seal, and because of the further fact that they are public records of a court, and equally accessible to either side.

[41] The Witness, E. F. HARGIS being first duly sworn testified as follows:

DIRECT EXAMINATION.

By I. M. Quillen:

Q. Your name I believe is E. F. Hargis?

A. Yes, sir.

Q. What official position, if any, do you hold in Russell County?

A. Clerk of the Circuit Court.

Q. As such Clerk of the Circuit Court of Russell County, Va., is it a part of your duties to be the custodian of the records in suits and actions brought and pending in said Court?

A. Yes, sir.

Q. I will ask you whether there is, or was until a few days ago, a suit in chancery pending in your Court under the style of Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, and in her own right as

plaintiff v. Dixie Splint Coal Company, et al, as defendants?

A. Yes, sir.

Q. I hand you a paper purporting to be the original bill, with exhibits attached, and ask you if that is the bill which was filed in that suit by the complainant?

A. Yes, sir, filed June 13, 1934.

Q. I hand you a paper purporting to be a Lis Pendens filed in that suit, and ask you if that paper was filed in your office?

A. Yes, sir, admitted to record June 14, 1934.

Q. I hand you a paper purporting to be the answer
[42] of Dixie Splint Coal Company, Inc., filed in that suit, and will ask you to state whether or not that paper was filed in your office?

A. Yes, sir, filed July 5, 1934.

Q. I hand you paper purporting to be the demurrer and answer of Scott Litton in that suit, and ask you if that paper was filed in your office?

A. Yes, sir, it was filed July, 1934.

Q. I hand you what purports to be an order entered in that suit on the 5th day of July, 1934, and ask you whether or not that is an order entered in that cause?

A. Yes, sir.

Q. I hand you a paper purporting to be an order in said cause on the 1st day of November, 1934, and ask you whether or not that is a paper filed in that cause?

A. Yes, sir, an order entered in that cause.

At this point it is agreed that the order entered in this cause on the 15th day of February, 1935, may be omitted from this record, and the following order is directed by the Court:

"This cause came on this the 15th day of February, 1935, to be heard upon the motion of the complainant, by counsel, to dismiss this cause without prejudice, to which motion counsel for the defendant appeared and stated that they had no objection to the motion. It is, therefore, ordered that said cause be, and the same is hereby dismissed without prejudice."

Q. Mr. Hargis, you have just heard his Honor
[43] from the bench direct an order in this chancery cause?

A. Yes, sir.

Q. I will ask you to make a copy of that order and file it in this cause?

A. I will.

Q. I hand you what purports to be a subpoena in chancery issued in said cause, and will ask you whether or not that subpoena, with the return thereon, was returned to your office and filed as a part of the record in that suit?

A. Yes, sir.

Q. Do the papers which you have just been asked about constitute the entire record in that suit?

A. Yes, sir.

Q. I now offer this record, and each of the papers identified by this witness' testimony in evidence, which papers are in the words and figures following:

"In the Circuit Court of Russell County, Virginia.

Jean McNeil Pepper, Executrix of
the estate of A. P. Pepper, deceased,
and in her own right.
vs. (BILL
Dixie Splint Coal Company, Inc.
Scott Litton, N. F. Castle, Sheriff
Russell County, Va., M. C. Chafin,
Deputy Sheriff for said N. F. Castle, and
P. H. Smith.

To the Honorable Judge of said Court:

[44] "Your Complainant, Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right, would respectfully show unto the Court:

That A. P. Pepper died testate in Bristol, Virginia, on the 18th day of June, 1933; and that Complainant duly qualified as his executrix in the Corporation Court of Bristol, Virginia, on the 6th day of July, 1933.

That on the 19th day of February, 1934, your complainant recovered from the Defendant, Dixie Splint Coal Company, Inc. a *jujdgment* for $9,000.00, with interest and costs, as will appear from copy of final decree and judgment in the cause of Jean McNeil Pepper, in her

own right and as Executrix of the Estate of A. P. Pepper, deceased, v. Dixie Splint Coal Company, Inc., et als, lately pending in the Corporation Court of Bristol, Virginia, said decree being hereto attached and made a part hereof.

That on the 31st day of May, 1934, execution was issued thereon, directed to the sheriff of Russell County, returnable to the 3rd Monday in July, 1934, and was by him levied upon the personal property of Dixie Splint Coal Company, Inc., said levy being made on the .... day of ....., 1934, at ..... M.

That on the 2nd day of June, 1933, Dixie Splint Coal Company, Inc., attempted, in the Clerk's office of Russell County, Virginia, to confess judgment in favor of Scott Litton, President of said Company, for the sum of $33,468.89, a copy of the entire proceeding being hereto attached, and asked to be read as a part hereof; that Scott Litton was, at said time, and still is, President of Dixie Splint Coal Company, Inc. and owner of practically all of its stock, and, Complainant is in-
[45] formed and therefore alleges, that Scott Litton claims that said judgment is for past due salary, though the said Litton is now in fact the sole owner of said corporation and uses its fictitious name instead of his own.

That execution was issued, at the instance of said Litton, upon said supposed confession of judgment on the first day of June, 1934, returnable to the first September Rules, 1934, and was levied upon the personal property of Dixie Splint Coal Company, Inc., said levy being made on the .... day of ..... 19.., at ..... m; the purpose being to defeat Complainant under her lien.

That by reason of said execution upon the supposed confession of judgment in favor of Scott Litton, he claims to have a lien prior to that of Complainant; but Complainant denies that he has any.

That said supposed confession of judgment is void for the following reasons:

1. Said judgment was confessed in the Clerk's Office of Russell County, Virginia, during a term of the Circuit Court thereof.

2. It is not shown by the record, that P. H. Smith, the officer of Dixie Splint Coal Company, Inc., confessing the same, had proper authority to do so, and such officer did not, in fact, have such authority, and was in fact only a nominal owner of sufficient stock to authorize him to be.

3. Dixie Splint Coal Company, Inc. is a "dummy" corporation, Scott Litton being the real party in interest, and the same person cannot be both plaintiff and
[46] defendant, acting in a dual capacity, adverse to the rights of creditors of the Corporation, of whom Complainant was one.

4. That said supposed confession of judgment was made with intent to hinder, delay or defraud Complainant from what she is lawfully entitled to.

5. That Dixie Splint Coal Company, Inc. is not indebted to Scott Litton in said sum of $33,568.89, or in any sum.

6. That said confession of judgment is void so far as the rights of Complainant are concerned, and in fact is void on its face, and as a matter of law.

That M. C. Chaffin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, Virginia, has advertised said property for sale under the execution of Scott Litton issued ..... 19..., said sale being set for June 14, 1934, between the hours of 10:00 A. M. and 4:00 P. M., as will appear from notice hereto attached, and made a part hereof, no copy of same being posted at the front door of the court house of Russell County.

Complainant avers that said notice of sale is void as a matter of law.

Complainant avers that any sale of said property will be void, and a purchaser will obtain no title thereto by virtue of purchase at said sale, for the reasons aforesaid, and as a matter of law.

That said alleged confession of judgment of Dixie Splint Coal Company, Inc. in favor of said Scott Litton, President of said corporation, was entered while the suit of your Complainant against Dixie Splint Coal

Company, Inc., Scott Litton and others, was pend-
[47] ing and undetermined in the Corporation Court of Bristol, Virginia, wherein the said Defendants were fearful of a judgment against them, and the said Litton was especially fearful of a judgment against him; thus the said Litton caused the aforementioned judgment to be confessed in his favor against the said Dixie Splint Coal Company, Inc. and thus, he accordingly brought under his control the said P. H. Smith, to do his bidding, who, complainant avers, was only a nominal figure acting for the said Litton, and was without a will of his own in all the transactions heretofore set out.

That on the 25th day of May, 1934, execution was caused to be issued from the Clerk's office of the Corporation Court of Bristol, Virginia directed to the Sergeant of the City of Bristol, Virginia, upon the judgment of Complainant against said Dixie Splint Coal Company, Inc., returnable on the first Monday in August, 1934, and was received by W. T. Crosswhite, Sergeant of the City of Bristol, Virginia, on May 25, 1934, at 10:00 a. m. and returned by him on May 28, 1934, with the following endorsement:

"Executed in Bristol, Va. on May 28, 1934, by levying on one Burrow Adding Machine, one oak desk, three chairs, one Chevrolet Tuck, Vt. License T-13-049 and 225 tons of coal more of less found at the yards of the Dixie Splint Coal Co. in Bristol, Va."

That on the 19th day of March, 1934, execution was caused to be issued from the Clerk's Office of Russell County, Virginia, directed to the Sheriff of Russell County, Virginia, returnable to the first Monday in June, 1934, upon the void judgment of Scott Litton, against Dixie Splint Coal Company, Inc., which execution was
on the ..... day of ..... 19..., levied upon
[48] the property of Dixie Splint Coal Company, Inc.

Being without remedy at law in the premises, your Complainant prays: that the aforesaid proceeding of Scott Litton against Dixie Splint Coal Company, Inc., be declared null and void; that the said confessed judgment be set aside and for nothing held; that the judgment of complainant as aforesaid be enforced against all of the property, personal and real, of the Dixie Splint Coal Company, Inc.,; that the proposed sale under the

said void judgment of the said Litton be enjoined; that a personal judgment be granted against the said Litton in addition to the said judgment hereinbefore mentioned and obtained by Complainant; that all officers participating in the proposed sale of said property be likewise held for personal judgments; that Scott Litton, individually, P. H. Smith, individually, Dixie Splint Coal Company, Inc., N. F. Castle, Sheriff of Russell County, Va., and M. C. Chaffin, *deputy* for said N. F. Castle, be made parties hereto by proper process, and required to answer this bill, but not under oath, the oath being waived; and that all proper accounts be taken, and your Complainant prays for such other, further, and general relief as in equity may seem meet.

JEAN McNEIL PEPPER,
in her own right and as Executrix of A. P. Pepper, deceased,
By Counsel.

A. K. MORISON,
H. E. WIDENER,
WARREN & CANTWELL,
Counsel."

"Virginia:

Corporation Court of the City of Bristol, on Mon-
[49] day, the 19th day of February, in the Year of Our Lord, Nineteen Hundred and Thirty-four.

Present: The Hon. Floyd H. Roberts, Judge.

Jean McNeil Pepper, Executrix and as sole devisee and distributee of A. P. Pepper, deceased,
vs. () FINAL DECREE.
Dixie Splint Coal Company, a Corporation, Scott Litton and others.

This cause was heretofore heard on the merits on the original and amended and supplemental bills, the answer and cross-bill of the defendants, the general replication of complainant to said answer, the answers of all defendants named in said cross-bill to same, the

general replication of complainants in the cross-bill to said answers, all pleadings on file and former orders and decrees entered, the depositions of witnesses and exhibits duly taken and filed in behalf of the respective parties, and upon argument of counsel, and the court having now maturely considered the same is of opinion for reasons stated in writing and filed as a part of the record, that complainants in said cross bill are not entitled to the relief prayed for, and doth so adjudge and decree.

The court is further of opinion, for the reasons aforesaid, that there is no liability herein against any of the parties named as defendants in the original and amended bills of complaint, except the Dixie Splint Coal Company, a corporation organized January 1, 1924, which is the respondent corporation herein, and that this suit should be abated as to all of said parties defendant, except said respondent corporation, and doth

[50] so order, adjudge and decree.

The Court is further of opinion, for the reasons aforesaid, and doth order, adjudge, and decree that said Complainant recover against said defendant, Dixie Splint Coal *Compay*, a Corporation, the sum of $9,000.00 with 6% interest on $3,000.00 part thereof, from July 1, 1929. on $3,000.00 part thereof from July 1, 1930, and on $3,000.00 the remainder thereof from July 1, 1931, until paid, and her reasonable costs in this behalf expended, for which execution may issue.

And this cause is stricken from the docket.

Said defendant desiring to apply for an appeal and supersedeas execution is suspended for ninety days provided defendant or someone for it shall within twenty days from this date execute a suspending bond before the Clerk of this Court with approved security in the penalty of $500.00, and conditioned as the law directs.

Complainant also desires to appeal

A Copy Teste:

DAN DRINKARD,
Clerk."

(For the record of the confession of judgment, see side page 5, et seq, herein.)

[54] NOTICE OF SALE

Take notice that I will on the 14th day of June, 1934, between the hours of 10 A. M. and 4 P. M. offer for sale to the highest and best bidder at the office of Dixie Splint Coal Company, Clinchfield, Virginia, at auction, for cash in hands the following property to-wit:

1 Morrow Jr. Shaker Screen Tipple and Equipment.
1 Westinghouse M. G. Set with Instruments and equipment.
1 General Electric five-ton Haulage locomotive and parts.
1 Jeffrey four-ton Haulage locomotive and parts.
1 Locomotive frame.
1 Lot—Wooden Mine cars—75
1 Lot Shop Tools.
1 Mine Fan and Motor (10 H. P.)
2 Mine Gathering Pumps and motors with pipe connections.
1 Jeffrey Tram Locomotive (10 ton)
1 Lot 7300 ft. 4/0
1 Lot 2500 ft. 2/0 Copper Trolley wire with hangers and fastenings.
1 Goodman Shortwall Machine and parts.
5500 Lineal feet of track—of 16 pound rail with switches and fastenings.
6800 Lineal feet of track—of 25 pound rail with switches and fastenings.
2600 Lineal feet of track—of 45 pounds rail with switches and fastenings.
1 Sand Dryer.
1 Iron Safe.
1 Adding Machine.
1 Small Stove.
1 Desk.
1 Royal Typewriter and typewriter desk.
1 Underwood Typewriter (old)
1 Lot miscellaneous office equipment.

[55] The above property is the property of the Dixie Splint Coal Company, Levied on to be sold to satisfy an execution in favor of Scott Litton against

said Dixie Splint Coal Company, which is now in my hands for collection.

Given under my hands this 2nd day of June, 1934.

M. C. CHAFFIN,
D. S. for N. F. Castle, Sheriff
of Russell County, Virginia."

(Notice of Lis Pendens, Filed June 14, 1934.

"Know All Men By These Presents that I, Jean McNeil Pepper, Complainant in the hereinafter styled cause, do give notice of lis pendens by this memorandum filed in the Clerk's Office of the Circuit Court of Russell County, Virginia, on the 14th day of June, 1934, which sets forth as follows:

There is now pending in the Circuit Court of Russell County, Virginia a certain cause, the title of which is Jean McNeil Pepper, individually and as Executrix of the Estate of A. P. Pepper, deceased, v. Dixie Splint Coal Company, Inc., et als; the general object
[56] thereof is to set aside and declare void a judgment confessed by Dixie Splint Coal Company, Inc., in favor of Scott Litton, in the Clerk's Office of Russell County, Virginia, on July 2, 1933; and to subject for the Complainant the following described property: 1 Morrow Jr. Shaker Screen Tipple, and equipment, 1 Westinghouse M. G. set with instruments and equipment, 1 General Electric five-ton Haulage Locomotive and parts, 1 Jeffrey four-ton haulage locomotive and parts, 1 locomotive frame, 1 lot—wooden mine cars, 75, 1 lot shop tools, 1 mine fan and motor (10 H. P.) 2 mine gathering pumps and motors with pipe connections, 1 Jeffrey Tram Locomotive (10 ton., 1 lot 7300 ft. 4/0, 2500 ft. 2/0 Copper trolley wire with hangers and fasteners, 1 Goodman Shortweall Machine and parts, 5500 lineal feet of track of 16 pound rail with switches and fastenings, 6850 lineal feet of track—of 25 pound rail with switches and fastenings, 2600 lineal feet of track —of 45 pound rail with switches and fastenings, 1 sand dryer, 1 iron safe, 1 adding machine, 1 small stove, 1 desk, 1 Royal typewriter and typewriter desk, 1 Underwood typewriter (old) and 1 lot miscellaneous office equipment, and, all other property, real, personal and

mixed, of every kind and description belonging to the persons hereinafter mentioned; the amount of the claim asserted by the Complainant is $9,000.00, with interest on $3,000.00 thereof from July 1, 1929, on $3,000.00 thereof from July 1, 1930, and on $3,000.00 thereof from July 1, 1931, and the costs and expenses thereof; and the names of the persons whose estates are intended to be affected thereby are: Dixie Splint Coal Company, Inc., and Scott Litton.

Witness my hand this 14th day of June, 1934.

[57]. JEAN McNEIL PEPPER

State of Virginia,
City of Bristol, to-wit:

I, Martha C. Smith, a Notary Public in and for the City and State aforesaid, do certify that Jean McNeil Pepper, whose name is signed to the writing above, bearing date on the 14th day of June, 1934, has acknowledged the same before me in my City and State aforesaid.

My commission expires Aug. 9, 1936.

Given under my hand on this the 14th day of June, 1934.

MARTHA C. SMITH,
Notary Public.

I, E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, in which the above mentioned cause of Jean McNeil Pepper, etc. v. Dixie Splint Coal Company, Inc. et als. is pending, do hereby authenticate the above memorandum according to the provision of Section 6469 of the Code of Virginia, and any amendments thereto, and declare that the facts stated in said memorandum are correct as shown by the record in said cause.

E. F. HARGIS,
Clerk."

Virginia:
County of Russell, to-wit:

In the Clerk's Office of the Circuit Court of the County and State aforesaid, the 14th day of June, 1934, at 8 o'clock A. M., the foregoing writing was presented and admitted to record, and together with the certificate of *acknowledgement* recorded. D. B. 87, page 375.

Teste:

E. F. HARGIS,
Clerk."

(ANSWER OF DIXIE SPLINT COAL CO., INC.)

"Virginia:

In the Circuit Court of Russell County:

Jean McNeil Pepper, Executrix, Complainant
vs.
Dixie Splint Coal Company, Inc., et al, Defendants.

[58] The answer of Dixie Splint Coal Company, Incorporated, to a bill of complaint exhibited against it and others in the Circuit Court of Russell County, Virginia, by Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right.

For answer to said bill or so much thereof as it deems material that it should answer, this respondent says:

That it is not advised as to the alleged death of A. P. Pepper, or the qualification of the complainant as his executrix and demands strict proof of same.

That it assumes it to be true, as alleged by *tthe* complainant, that the complainant has recovered a judgment against Respondent in the principal sum of $8000.00.

That it is not advised as to the truth or falsity of the allegation that execution has been issued upon said judgment and placed in the hands of an officer and levied and neither admits nor denies such allegation.

That it is true that on the 2nd day of June, 1933, pursuant to the authorization given by its Board of Directors and ratified by a meeting of its stockholders, Respondent confessed judgment in the Clerk's Office of Russell County Virginia, in favor of Scott Litton for the principal sum of $33,468.89. This judgment was confessed upon an obligation justly due and owing by the Corporation to the said Scott Litton.

That execution was issued upon said judgment
[59] in favor of Scott Litton and that pursuant to said execution the tangible personal property of the Corporation was levied upon and sold.

This Respondent denies that the said confession of judgment was made with the intention upon its part to hinder, delay or defraud the complainant or any of its creditors.

This Respondent denies the allegation that it is a "dummy" corporation; and that Scott Litton owns "practically all of its stock", as alleged.

Respondent here denies each and every allegation in said bill not hereinbefore admitted or denied.

Having fully answered, this Respondent prays that it be hence dismissed with its reasonable costs in this behalf expended.

DIXIE SPLINT COAL COMPANY, INC.,
Respondent.

By Counsel:
GREEVER & GILLESPIE,
QUILLEN & QUILLEN, p. d."

Circuit Court Russell County. Filed July 5, 1934."

E. F. HARGIS,
Clerk.

(DEMURRER & ANSWER OF P. H. SMITH).

"Virginia:

In the Circuit Court of Russell County

Jean McNeil Pepper, Executrix, Complainant,
vs.
Dixie Splint Coal Company, Inc., et al, Defendant

The separate demurrer and answer of P. H. Smith
[60] to a bill of complaint exhibited against him and others in the Circuit Court of Russell County, Virginia, by Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right.

The undersigned P. H. Smith, by counsel, comes and demurs to the complainant's said bill and says that the same is not sufficient in law and for grounds of demurrer says:

(1) That the bill of complaint contains no allegation which would entitle the complainant to recover a personal judgment against him in any amount.

(2) That the bill of complaint contains no allegation showing P. H. Smith to be either a necessary or proper party to the said suit, and that the said P. H. Smith is improperly joined as a party to said suit.

Without waiving said demurrer, but relying thereon, if held for further answer to said bill, for answer thereto or so much thereof as he deems it material that he should answer, this respondent says:

That he is not advised as to the alleged death of A. P. Pepper or the alleged qualification of the complainant as executrix of his estate and demands strict proof of same.

That he is not advised as to the truth or falsity of the allegation that the complainant has recovered judgment against Dixie Splint Coal Company, Incorporated, or that execution thereon has been issued and levied and neither admits or denies such allegations, but demands strict proof of same.

That as an officer of the Dixie Splint Coal Com-
[61] pany Incorporated, pursuant to the direction given him by the Board of Directors of said Corporation and ratified by a meeting of the stockholders of said Corporation, this Respondent did, on the 2nd day of June, 1933, upon behalf of the said Dixie Splint Coal Company, Incorporated, confess judgment in the Clerk's Office of Russell County, Virginia, in favor

of Scott Litton for the principal sum of $33,468.89. Your Respondent denies the allegation in the bill that the said judgment was confessed by him without proper authority or that the said judgment was confessed with any intention on the part of your Respondent to hinder, delay or defraud the complainant or any other creditor of said Corporation, and likewise denies the allegation of said bill that he in any manner acted under the control of Scott Litton or any other person without will of his own but says that in any and all actions taken by him in the premises he acted pursuant to the mandate of the Directors and Stockholders of the said Corporation.

Your Respondent is advised that execution has heretofore issued on the aforementioned judgment in favor of Scott Litton and that pursuant to said execution all of the tangible personal property of the Dixie Splint Coal Company, Incorporated has been levied upon and sold for the satisfaction of said judgment.

This Respondent here denies each and every allegation of the said bill, not hereinbefore either admitted or denied.

Your Respondent avers that he has no interest whatever in the subject matter of this litigation, except as a stockholder in the Dixie Splint Coal Company, Incorporated, and that he has been improperly joined as a party defendant to this action and prays that he [62] may be dismissed as such party.

Having fully answered this Respondent prays that he be hence dismissed with his reasonable cost in this behalf expended.

P. H. SMITH,
By Counsel.

GREEVER & GILLESPIE,
QUILLEN & QUILLEN, p. d.

Circut Court of Russell County. Filed July 5, 1934.

E. F. HARGIS,
Clerk."

(DEMURRER AND ANSWER OF SCOTT LITTON).

"Virginia:

In the Circuit Court of Russell County:

Jean McNeil Pepper, Executrix, Complainant,
vs.
Dixie Splint Coal Company, Inc., et al, Defendants.

The separate demurrer and answer of Scott Litton to a bill of complaint exhibited against him and others in the Circuit Court of Russell County, Virginia, by Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right.

The defendant Scott Litton, by counsel, comes and demurs to the complainant's bill and says that the same is insufficient in law, and for grounds of demurrer says:

That the bill contains no allegation which would entitle the complainant to recover a personal judgment against him for any amount.

[63] Without waiving said demurrer but relying thereon, if held for further answer to said bill, for answer thereto or to such part thereof as he deems he should answer, this Respondent says:

That he is not advised as to the alleged death of A. P. Pepper, or the qualification of the complainant as his executrix, but demands strict proof of same.

That he assumes it to be true as alleged that the complainant recovered a judgment against the Dixie Splint Coal Company, Incorporated, in the amount of $9000.00, but that he is not advised as to the alleged issuance of execution thereon or the alleged levy made pursuant thereto and demands strict proof of same.

That it is true as alleged by said bill that the Dixie Splint Coal Company, Incorporated, confessed judgment in favor of your Respondent on the 2nd day of June, 1933, in the Clerk's Office of Russell County, Virginia, for the principal sum of $33,468.89, but here denies that the said confessed judgment is void for any of the reasons alleged by the complainant and that the

said judgment was confessed without proper authority or with the intention on the part of your Respondent to hinder, delay or defraud the complainant or any other creditor of the Dixie Splint Coal Company, Incorporated, but on the contrary this Respondent says that the aforesaid judgment was confessed pursuant to the regular authorization of the stockholders and directors of said Corporation upon indebtedness, justly and fairly due your Respondent.

[64] Your Respondent avers that on the 19th day of March, 1934, execution was regularly issued from the Clerk's Office of Russell County, Virginia, upon your Respondent's aforementioned judgment and placed in the hands of the Sheriff of Russell County for execution, and that pursuant thereto levy was made upon the tangible personal property of the Dixie Splint Coal *Coal* Company, Incorporated and the same duly and regularly sold pursuant to said levy.

It is true that the Respondent is the President of the Dixie Splint Coal Company, Incorporated, but it is not true, as alleged that he is the owner of practically all of the stock of said Corporation or that the Dixie Splint Coal Company, Incorporated is a "dummy Corporation.

Your Respondent here denies each and every allegation of said bill not hereinbefore admitted or denied.

Having fully answered, this Respondent prays that he be hence dismissed with his reasonable costs in this behalf expended.

SCOTT LITTON,
Respondent.

By Counsel:
GREEVER & GILLESPIE,
QUILLEN & QUILLEN, p. d.

Circuit Court Russell County. Filed July 5, 1934.

E. F. HARGIS,
Clerk."

(ORDER ENTERED JULY 5, 1934).

"Virginia:

In the Circuit Court of Russell County:

Jean McNeil Pepper, Executrix, Complainant
vs. ORDER.
Dixie Splint Coal Company, Inc., et al, Defendants.

This day came the defendants, Dixie Splint Coal
[65] Company, Incorporated, Scott Litton, and P. H. Smith, and filed their respective separate demurrers and answers to the complainant's bill."

Enter this order this 5th day of July, 1934.

A. G. LIVELY,
Judge."

ORDER OF NOV. 1st, 1934).)

"Virginia:

In the Circuit Court of Russell County:

Jean McNeil Pepper, Executrix, Complainant,
vs. () ORDER.
Dixie Splint Coal Company, Inc., et al, Defendants.

It appearing to the court from the statement of counsel for Jean McNeil Pepper, Executrix, etc., and counsel for Scott Litton, as well as from examination of the papers filed in this cause and the papers filed on a certain motion to quash an execution under the style of Dixie Splint Coal Company, Inc., for the use and benefit of Jean McNeil Pepper, Executrix, etc. v. Scott Litton now pending on the law side in this court, that in the aforementioned action the plaintiff therein, who is the same person as the Jean McNeil Pepper, plaintiff, in this suit seeks relief which is prayed for by her pleadings in this suit; upon the motion of counsel for the defendant, Scott Litton, this day made at bar, it is ordered that complainant, Jean McNeil Pepper, appear before the Judge of this Court on the 10th day of November,

1934, and show cause, if any she has, why she should not be requested to elect whether she will prosecute said action or this suit. It is further ordered that a
[66] copy of this order be served upon the complainant Jean McNeil Pepper.

Service accepted for Jean McNeil Pepper for November 10th, 1934.

GEO. M. WARREN,
of counsel for J. McN. Pepper.'

"Enter this order this Nov. 1, 1934.

A. G. LIVELY,
Judge."

(Subpoena in Chancery)

"The Commonwealth of Virginia,

To the Sheriff of the County of Russell,—Greeting:

We Command You, that you summon, Dixie Splint Coal Company, Inc., Scott Litton, N. F. Castle, Sheriff of Russell County, Va., M. C. Chaffin, Deputy Sheriff for N. F. Castle, and P. H. Smith to appear at the Clerk's Office of the Circuit Court of the County of Russell, at the rules to be held for the said Court on the third Monday in June, 1934, to answer a bill in chancery exhibited against them in our said Court by Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right. And have then there this writ. Witness E. F. Hargis, Clerk of our said Court, at the Courthouse, the 13th day of June, 1934, and in the 158 year of the Commonwealth.

A Copy, Teste:

E. F. HARGIS,
Clerk."

[67] ORDER ENTERED FEB. 15. 1935.

Jean McNeil Pepper, Executrix of the estate of
A. P. Pepper, Deceased, and in her own right.
vs. () ORDER
Dixie Splint Coal Company, Inc.;
Scott Litton, N. F. Castle, Sheriff
Russell County, Va., M. C. Chaffin, D. S.
for N. F. Castle, and P. H. Smith.

This cause came on this the 15th day of February, 1935, to be heard upon the motion of the complainant, by counsel, to dismiss this cause without prejudice, to which motion counsel for the defendant appeared and stated that they had no objection to the motion. It is, therefore, ordered that said cause be, and the same is hereby dismissed without prejudice.

[68] (ENDORSEMENT ON BACK)

"Executed on Dixie Splint Coal Co., Inc. Scott Litton, N. F. Castle, Sheriff of Russell County, Va., M. C. Chafin, Deputy Sheriff for N. F. Castle, and P. H. Smith, by delivering to each of them in person a true copy of the within subpoena in Russell County, Virginia, on the 14th day of June, 1934.

S. A. FERGUSON,
C. R. C."

[69] Q. I will ask you if there was, until very recently, an action at law pending in your Court, in the form of a motion to quash a certain execution in the name of Dixie Splint Coal Corporation for the benefit of Jean McNeil Pepper, v. Scott Litton, Defendant?

A. Yes, sir.

Q. Is the record of that case now in your custody?

A. Yes, sir.

Q. I hand you a paper purporting to be the plaintiff's motion, with certain exhibits attached thereto, filed in that action, and ask you whether or not that paper was filed in your office?

A. Yes, sir, it was filed Oct. 6, 1934.

Q. I hand you a paper purporting to be the plea of Scott Litton, to that motion to quash filed in that action,

and ask you whether or not that paper was filed in your office?

A. Yes, sir. Filed Oct. 6, 1934.

Q. I hand you a paper purporting to be a notice that motion would be made upon a particular date, filed in that cause, and ask you whether or not that paper was filed in your office?

A. Yes, sir, filed Oct. 2nd, 1934.

Q. Has any other order been entered in that ac-
[70] tion?

A. Yes, sir. Order was entered 15th of February, 1935.

Q. I will ask you to read from the court's order book such other order as has been entered in that action?

A. "Jean McNeil Pepper v. Scott Litton, et al.

On motion of plaintiff by counsel, it is ordered that this cause be, and the same is hereby dismissed from the docket without prejudice."

Q. Has any other order been entered in that action?

A. No, sir.

Q. Do the papers about which you have been asked constitute the entire record of that proceeding?

A. Yes, sir.

Q. We offer in evidence this record, and each of the papers concerning which this witness has testified, which papers are in the words and figures following:

(MOTION TO QUASH EXECUTION)

"Virginia:

In the Circuit Court of Russell County.

Dixie Splint Coal Company, Inc.,
for the use and benefit of
Jean McNeil Pepper, Executrix of
the Estate of A. F. Pepper, Deceased,
and in her own right, as sole devisee
of said A. P. Pepper,
vs.
Scott Litton.

To the Honorable A. G. Lively, Judge of said Court:

Comes the undersigned, Jean McNeil Pepper, as
[71] executrix of the estate of A. P. Pepper, deceased, and in her own right as sole devisee of A. P. Pepper, deceased, in the name of Dixie Splint Coal Company, Inc., for the use and benefit of the undersigned, and moves the Court to quash those certain executions issued by the Clerk of the Circuit Court of Russell County, Virginia, on the 19th day of March, 1934, and on the first day of June, 1934, upon an alleged judgment dated June 2, 1933, in which Scott Litton was plaintiff and Dixie Splint Coal Company, Inc. was defendant, said alleged judgment being of record in said Clerk's office, and being for the sum of $33,468.89; said motion being upon the following:

Said executions are void for the reason that they are issued upon a judgment which is void upon the following grounds:

1. Said alleged judgment was not confessed by the debtor itself, in person.

2. The Dixie Splint Coal Company, Inc. is not a natural person and, therefore, cannot appear in person for the purpose of confessing judgment, but must do so by duly constituted attorney-in-fact acting under and by virtue of a warrant fully executed and acknowledged by the corporation as deeds are required to be acknowledged before any officer or person authorized to take acknowledgments of writings to be recorded in Virginia.

3. No such writing as required by the preceding paragraph was executed or filed; nor did P. H. Smith, in making said alleged confession of judgment act, or purport to act, under such writing. Certified copy of all of the record of said alleged confession of judgment is hereto attached, and referred to as though fully set forth herein.

4. P. H. Smith had no authority by virtue of his
[72] office as Secretary or Treasurer of Dixie Splint Coal Company, Inc. and no authority in fact, to make said alleged confession of judgment.

Wherefore the undersigned, in the name of Dixie Splint Coal Company, Inc. for the use and benefit of the undersigned who is a judgment creditor of Dixie Splint Coal Company, Inc. moves the Court to order said executions quashed and for nothing held.

Respectfully submitted,

JEAN McNEIL PEPPER,
Executrix of the Estate of A. P. Pepper, Deceased, and as Sole Devisee of A. P. Pepper, deceased,
By Counsel.

A. K. MORRISON,
WARREN & CANTWELL,
Counsel."

[For record of confession of Judgment see side page 5 et seq. herein].

[76] (PLEA OF SCOTT LITTON)

"Virginia:

Dixie Splint Coal Company, Inc., for the use and benefit of Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, Deceased, and in her own right as sole devisee of said A. P. Pepper, Plaintiff,
vs. () PLEA ON MOTION TO QUASH EXECUTION.
Scott Litton, Defendant.

The defendant, Scott Litton, by counsel, comes and says that the Circuit Court of Russell County, Virginia, is without jurisdiction to hear and pass upon the issues raised by said motion for the following reasons, to-wit:

(1) Pursuant to its petition filed on the 4th day of September, 1934, in the United States District Court for the Western District of Virginia, the Dixie Splint Coal Company, Inc., was on the 7th day of September, 1934, duly adjudged bankrupt, and on the 26th day of September, 1934, P. H. Smith was duly and regularly elected

and qualified as Trustee of the estate of the bankrupt. If the Dixie Splint Coal Company, Inc., is indebted to Jean McNeil Pepper, Executrix, or in her own right, in any amount, which is not admitted, such indebtedness renders her only a common creditor of the bankrupt's estate. The United States District Court for the Western District of Virginia has assumed jurisdiction of all matters touching the rights and duties of the bankrupt, and all of its creditors and no suit touching the rights or liabilities of the bankrupt or any of its creditors can be litigated in any other court save and except by direction of the said United States Court and in no event could any such action be maintained except in the name of the Trustee for the bankrupt. There has been no order entered in the United States District Court
[77] for the Western District of Virginia authorizing the prosecution of such an action.

(2) Jean McNeil Pepper, Executrix and in her own right, as aforesaid, claims to be a judgment creditor of Dixie Splint Coal Company, Inc., by reason of a judgment rendered in her favor against the said Dixie Splint Coal Company, Inc., in the Corporation Court of the City of Bristol. The said suit last above named is now pending and undetermined in the Supreme Court of Appeals of Virginia, and it is not established that the said Jean McNeil Pepper, Executrix and in her own right, is a creditor at all of the Dixie Splint Coal Company, Inc., and pending final determination of that issue in the Court of Appeals of Virginia, this court is without jurisdiction to hear and determine this issue."

(NOTICE OF MOTION TO QUASH).

"In the Circuit Court of Russell County, Virginia:

Dixie Splint Coal Company, Inc., for the use and benefit of Jean McNeil Pepper, Executrix of Estate of A. P. Pepper, Deceased, and in her own right as Sole Devisee of said A. P. Pepper,

vs.

Scott Litton

To Scott Litton:

You are hereby notified that on the 6th day of October, at 9:30 o'clock A. M. the undersigned, Jean Mc-

Neil Pepper, as executrix of the estate of A. P. Pepper, Deceased, and in her own right as sole devisee of A. P. Pepper, will in the name of Dixie Splint Coal Company, Incorporated, for the use and benefit of the un-
[78] dersigned move the circuit court of Russell County, Virginia, at the courthouse thereof, in Lebanon, to quash a certain execution issued by the Clerk of the Circuit Court of Russell County, Virginia, on the 19th day of March, 1934, on a judgment by confession entered in said Clerk's office on June 2nd, 1933, in favor of Scott Litton against Dixie Splint Coal Company, Incorporated, for the sum of $33,468.89.

Given under my hand this 2nd day of October, 1934.

JEAN McNEIL PEPPER,
Executrix of the estate of A. P. Pepper, Deceased, and in her own right as sole devisee of A. P. Pepper, Deceased,
By Counsel."

A. K. MORISON,
H. G. MORISON, JR.,
H. E. WIDENER,
WARREN & CANTWELL,
Counsel."

Order entered Feb. 15, 1935:

Jean McNeil Pepper, Admnx., et al
vs.
Scott Litton, et al

Upon motion of the plaintiffs by counsel, it is ordered that this case be, and the same is hereby dismissed from the docket without prejudice.

(RETURN ENDORSED ON BACK OF SAID MOTION)

"Executed the within notice in Russell County, Va., this 2nd day of October, 1934, by delivering a true copy thereof, in writing, to Pauline Litton, wife of Scott Lit-

ton, at his usual place of abode in Russell County, Va., she being a member of his family, over the age of 21 years, found at his usual place of abode, and by explaining to her the purport thereof, the said Scott Litton not being found at his usual place of abode.

W. R. THOMAS,
D. S. for N. F. Castle, S. R. C."

Q. I will ask you whether or not there is pending
[79] in your Court an action at law in the form of an interpleader, wherein M. C. Chafin, D. S. is the plaintiff, and Scott Litton, et al, are the defendants?

A. Yes, sir.

Q. Do you have in your custody the record of that proceeding?

A. Yes, sir.

Q. I hand you what purports to be the petition of M. C. Chafin filed in the interpleader proceeding just mentioned, and ask you whether that paper was filed in your office?

A. Yes, sir, it was filed June 15, 1934?

Q. I hand you what purports to be the process that the Court issued pursuant to plaintiff's petition, and ask you if that paper has been duly returned and filed in your office, with the officer's return noted thereon?

A. Yes, sir.

Q. I hand you a paper purporting to be the answer of Jean McNeil Pepper, Executrix, to the petition and interpleader heretofore mentioned, and ask you if that paper was filed in your office?

A. Yes, sir, filed July 13, 1934.

Q. I hand you a paper purporting to be an order
[80] entered in said action on the 15th day of June, 1934, and ask you whether that paper is an order entered in the action and filed in your office?

A. Yes, sir.

Q. I hand you a paper purporting to be an order entered in that action under date of 6-20-34, and ask you whether or not that is an order entered in that action?

A. Yes, sir.

Q. I hand you paper purporting to be the answer of Scott Litton filed in said action on June 30, 1934, and ask you if that paper was filed in your office?

A. Yes, sir.

Q. I hand you a paper purporting to be an order entered in that action on the 18th day of July, 1934, and ask you whether that order was entered in the action?

A. Yes, sir.

Q. I hand you a paper purporting to be the report of E. F. Hargis, Clerk, with attached thereto as exhibits a letter to E. F. Hargis, Clerk from A. K. Morison, under date of July 20, 1934; what purports to be copy of letter from Clarance C. Burns to A. K. Morison, under date of July 16, 1934, and what purports to be copy of letter from E. F. Hargis, Clerk to A. K. Morison, under date of July 18, 1934, and ask you whether said report, and papers mentioned, is the report filed by you as Clerk with the aforesaid Exhibits attached, in said action?

A. Yes, sir, it is.

Q. I hand you paper purporting to be petition of
[81] P. H. Smith, Trustee in Bankruptcy, filed in said action, and ask you whether that paper was filed in your office?

A. Yes, sir, filed Oct. 3, 1934.

Q. I hand you what purports to be an order entered in that action on the 3rd day of October, 1934, and ask you whether that order was entered in that action?

A. Yes, sir.

Q. I will ask you whether or not any order was entered in that action on the 10th day of November, 1934, of record, but which is not embodied in the written pleadings, or Court File?

A. Yes, sir.

Q. I will ask you to read that order please?

(Order read in the words and figures following):

"McKinley Chafin, D. S. Petitioner v. Scott Litton, et al, Defendants; Upon motion of M. C. Chafin, D. S., it is ordered that Jean McNeil Pepper, Executrix of A. P. Pepper, Deceased, be and she is hereby designated as plaintiff in this case, and the said M. C. Chafin is hereby relieved from further liability for costs in this case."

Q. What is the Order Book reference?

A. Common Law Order Book No. 20, page 348.

Q. I hand you paper purporting to be the answer of Scott Litton to petition of P. H. Smith, and will ask you whether or not that paper is filed in your office?

A. Yes, sir.

Q. I hand you two certain papers, one being a re-
[82] ceipt of Clinchfield Coal Corporation to E. F. Hargis, Clerk, for $2153.00, dated July 18, 1934, attached to a letter from John A. Muse to E. F. Hargis, Clerk, under date of July 23, 1934, and ask you whether or not these papers were filed in the cause as Exhibits with the Clerk's report which you testified about awhile ago?

A. Yes, sir.

Q. I hand you paper purporting to be an order entered in said action on the 1st day of November, 1934, and will ask you whether or not that order was entered in said cause?

A. Yes, sir.

Q. I hand you a paper purporting to be a copy of the process on the original petition of McKinley Chafin, and upon which is noted an acceptance of service on behalf of Jean McNeil Pepper by A. K. Morison, her counsel, under date of July 15, 1934, and will ask you whether or not that paper was filed in your office?

A. It is part of the record, but it is not marked "filed."

Q. I hand you what purports to be a summons to answer the Petition of P. H. Smith filed in that action, and ask you whether or not that summons, with the return noted thereon, was filed in your office?

A. Yes, sir.

Q. I hand you what purports to be a fieri facias
[83] in debt, issued from your office on the 19th day of March, 1934, upon a judgment in favor of Scott Litton v. Dixie Splint Coal Company, Inc., for $33,468.89, with certain notations and returns thereon of the officers handling it, and ask you first, whether that execution was issued from your office, and whether it is filed as an Exhibit with the petition of M. C. Chafin in that action?

A. Yes, sir.

Q. I hand you a paper purporting to be an order entered in said action on November 10, 1934, and ask you whether or not that order was entered in this proceeding?

A. Yes, sir. It is not marked "entered", but I will mark it.

Q. Has any other order been entered, or paper filed in that action?

A. None that I know of.

Q. Do the papers to which reference has been made, and about which you have testified, constitute the entire record of that action?

A. Yes, sir.

By I. M. Quillen:

We offer in evidence each of the papers identified by the Clerk as constituting a part of the record in the case of McKinley Chafin, D. S. v. Scott Litton, et al, save and except the order entered on the 10th day of November, 1934, which we contend to be a nullity for the reason that it purports to have the effect of nullifying, at least in part, an agreed order formerly entered in the cause, agreed and subscribed to by all the parties in interest in the action, which was a final order in said action, and the order now referred to shows upon
[84] its face to have not been entered upon the motion of any party in interest, or upon any showing that would justify the entry thereof, and was unauthorized and not supported by any evidence or pleading in the case.

The Court:

Ask Mr. Hargis your question then, leaving that out.

A. It is all the record with the exception of the order entered on the 10th of November, 1934. The way I understood it before, it was all the record.

The Court:

I think I will take a little time to look at my notes.

Mr. Quillen:

Your Honor, if it be without objection, to avoid question, I will *trike* out any reference to that order at all.

Mr. Heuser:

We prefer that nothing be stricken from the record. However, we do not object to them not offering the order themselves, because it is already in. It is agreeable to us, they need not offer it if they do not want to.

Mr. Quillen:

We now offer the papers identified by Mr. Hargis in

the suit of M. C. Chafin, D. S. v. Scott Litton, with the exception of the order of Nov. 10, 1934, which papers are in the words and figures following:

"To the Honorable A. G. Lively, Judge of the Circuit Court of Russell County, Virginia:

Your petitioner, M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, Virginia, would most respectfully represent:

That on the 19th day of March, 1934, an execution of fieri facias was issued from the Clerk's Office
[85] of the Circuit Court of the County of Russell, Virginia, at the instance of Scott Litton against the goods and chattels of Dixie Splint Coal Company, Inc., for the sum of $33,468.89, with interest thereon from the 2 day of June, 1933, until paid and an additional sum of $13.25 adjudged cost; and that afterwards, to-wit, on the 19th day of March, 1934, at 8 o'clock P. M. the said writ of fieri facias came to the hands of your Petitioner, as such Deputy Sheriff for N. F. Castle, Sheriff of Russell County, Virginia;

That on the 19th day of March, 1934, the said execution was, by your petitioner as such Deputy Sheriff for N. F. Castle, levied upon certain goods and chattels as and for the goods and chattels of the said Dixie Splint Coal Company, Inc., to-wit: one tipple and equipment, one MG set, instruments and equipment, 3 haulage locomotives, 75 mine cars, one lot of shop equipment, 3 pumps and pipe connections, one mining machine, one lot of copper wire, one lot or all of the office equipment, one sand dryer, 5500 lineal feet of 16 lb. rail switches and material, 2600 lineal feet of 45 lb. steel track with switches, connections and materials, two fans and motors, one lot of tools, all supplies and materials, and two motor frames and accessories;

That subsequently, to-wit, on the 31st day of May, 1934, an execution of fieri facias was issued from the Clerk's Office of the Corporation Court of the City of Bristol, Virginia, at the suit of Jean McNeal Pepper, Executrix of A. P. Pepper, deceased against the goods and chattels of Dixie Splint Coal Company, Inc., for the sum of $9,000.00, with interest on $3,000.00, part thereof, from the 1st day of July, 1929, until paid, and with in-

terest from July 1st, 1930 on $3,000.00, another
[86] part thereof, until paid, and with interest from July 1st, 1931, on $3,000.00, the residue thereof, till paid and also $160.45 adjudged cost; and that afterwards, to-wit: on the 2nd day of June, 1934, at 1 o'clock P. M., the said writs of fieri facias came to your petitioner's hands, as such Deputy Sheriff for N. F. Castle, Sheriff of the County of Russell, Virginia, and which said execution of writ of fieri facias was, on said 2nd day of June, 1934, duly levied upon all of the aforementioned personal property, all of which is located and situate in the County of Russell, Virginia;

That on the 12th day of June, 1934, Clinchfield Coal Corporation served notice upon your undersigned petitioner, giving notice of a claim of a prior lien on all of the aforesaid property, and demanding that in case of sale that so much of the proceeds of same as might be necessary to pay off and satisfy a claim of $2153.00 for rents be applied in paying off and satisfying said sum, as indebtedness due to the said Clinchfield Coal Corporation:

That on the 14th day of June, 1934, after having advertised the time and place of sale, as provided by law, your undersigned petitioner, as such Deputy, offered for sale at public auction on the premises of the said Dixie Splint Coa. Company, Inc., each and all of the aforesaid items of personal property, and at which said sale Scott Litton, as agent for the Dixie Coal Company, a proposed corporation in the process of incorporation, became the purchaser thereof at the price of $3200.00, which was paid to your petitioner as such Deputy Sheriff;

That no indemnifying bond has been given to your
[87] said petitioner, and the said Scott Litton and Jean McNeal Pepper, Executrix of A. P. Pepper, deceased, are each claiming the proceeds of the said sale upon their respective writs of fieri facias, and the said Clinchfield Coal Corporation is asserting a priority against the said fund in the sum of $2153.00;

Your petitioner has retained as commissions upon the said sale the sum of $84.00, and an additional $1.50 as levy fee, and tenders herewith the residue thereof, to-wit: $3114.50 into Court.

Your petitioner is advised, believes, and here avers that, under and in pursuance of Section 6152 of the Code of Virginia, it becomes and is the duty of your petitioner to institute interpleader proceeding and cause the respec-

tive claimants to appear before the Circuit Court of the County of Russell, Virginia, to litigate their respective rights touching the said proceeds from the said sale.

Wherefore, your petitioner prays that as well the said Scott Litton, Jean McNeal Pepper, Executrix of A. P. Pepper, deceased, and the Clinchfield Coal Corporation may be caused to appear before the Circuit Court of the County of Russell, Virginia, to state and litigate their respective claims as touching the goods and chattels aforesaid, in order to a decision of their respective rights touching the same.

And your petitioner will ever pray, etc.

M. C. CHAFFIN,
Deputy Sheriff for N. F. Castle, S. R. C."

"Virginia:
County of Russell, to-wit:

This day M. C. Chafin, Deputy Sheriff for N. F.
[88] Castle, Sheriff of Russell County, Virginia, appeared in person before me, E. F. Hargis, Clerk of the Circuit Court of the said County of Russell, Virginia, and made oath that the matters and things set forth in the foregoing petition are true and correct.

Given under my hand this 15th day of June, 1934.

E. F. HARGIS,
Clerk."

"Circuit Court of the County of Russell on Friday the 15th day of June in the year of our Lord, one thousand nine hundred and thirty four.

Present: The Honorable A. G. Lively, Judge.

Upon motion of M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, to be permitted to file his petition under provisions of Section 6152 of the Code of Virginia, and it appearing to the Court that upon a writ of fieri facias issued from the Clerk's Office of the Circuit Court of the County of Russell, Virginia, in favor of Scott Litton against the goods and chattels of Dixie Splint Coal Company, Inc., certain goods and

chattels were levied upon by the said M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, and which said goods and chattels were, after having been advertised, sold to satisfy the said writ of fieri facias, and that Jean McNeal Pepper, Executrix of A. P. Pepper, deceased, has asserted a claim or lien against the proceeds of the said sale in the sum of $9,000.00, with interest and cost thereon, and that the Clinchfield Coal Corporation has likewise asserted, as a prior lien, a claim of $2153.00 and that no indemnifying bond has been given, and that it is proper for the issuance of an interpleader for such cases made and

[89] provided by law; it is, therefore, adjudged, and ordered that as well the said Scott Litton, the said Jean McNeil Pepper, Executrix of A. P. Pepper, *deceased*, and the Clinchfield Coal Corporation be summoned to appear here on the 30th day of June, 1934, to state and litigate their respective claims as touching the said goods and chattels mentioned and described in the petition and the proceeds of the sale of same, in order to a decision of their respective rights severally touching the same.

And it is further adjudged and ordered that the said M. C. Chafin be, and hereby is, permitted to pay into Court the sum of $3114.30, the net proceeds of the sale of the said goods and chattels, less the commissions of sale and $1.50 levy fee, provided by law, and that the Clerk of this Court shall execute his receipt to the said M. C. Chafin, evidencing the said payment, and which said payment is accordingly this day made into open Court.

All of which is accordingly adjudged and ordered.

A Copy, Teste:

E. F. HARGIS,
Clerk."

"June 15, 1934. Executed on Clinchfield Coal Corporation, by delivering a true copy of the within notice to E. E. Thacker, Assistant Secretary of the said Clinchfield Coal Corporation at the offices of the said Clinchfield Coal Corporation, at Dante, Russell County, Virginia, the principal offices of said Company in said County being at Dante, Va.

M. C. CHAFFIN,
D. S. for N. S. Castle, S. R. C."

"June 20, 1934. Executed on Scott Litton by de-
[90] livering to him in person a true copy of the within notice in Russell County, Virginia.

M. C. CHAFFIN,
D. S. for N. S. Castle, S. R. C."

(ANSWER OF JEAN McNEIL PEPPER, EXECUTRIX).

"Virginia:

In the Circuit Court of Russell County.

M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County.
vs.
Scott Litton, Jean McNeal Pepper, Executrix, and Clinchfield Coal Corporation.

ANSWER:

To the Honorable A. G. Lively, Judge of said Court:

The answer of Jean McNeil Pepper, executrix and sole devisee of the estate of A. P. Pepper, deceased, to the petition of M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, to interplead under section 6152 of the Code of Virginia, as to the sum of Three thousand One Hundred and Fourteen dollars and Fifty cents ($3,144.50) which sum represents the proceeds of the sale, after levy of certain goods and chattels by the said M. C. Chafin upon a writ of fieri facias issued by the Clerk of the Circuit Court of Russell County, in satisfaction of the judgment of Scott Litton against the Dixie Splint Coal Company, answers and says:

(1) Without prejudice to her rights and claims asserted in the Chancery cause of Jean McNeil Pepper, Executrix, etc. against Scott Litton, et als, now pending in the Circuit Court of Russell County, Virginia, the gen-
eral subject of which is to set aside and have de-
[91] clared void the judgment under which the sale was made, from which M. C. Chafin, Deputy

Sheriff for N. F. Castle derived the fund here in question, answers that she admits the priority of the lien asserted by Clinchfield Coal Corporation in the sum of Two thousand One hundred and Fifty three dollars ($2,153.).

And now having fully answered this respondent prays to be hence dismissed with her reasonable costs by her expended in this behalf.

JEAN McNEIL PEPPER,
By Counsel.

H. G. MORISON, JR.,
WARREN & CANTWELL,
H. E. WIDENER."

(ORDER ENTERED JUNE 15, 1934).

"Virginia:

In the Circuit Court of the County of Russell.

Upon the motion of M. C. Chafin, Deputy Sheriff for N. F. Castle, Sheriff of Russell County, to be permitted to file his petition under provisions of Section 6152 of the Code of Virginia, and it appearing to the Court that upon a writ of fieri facias from the Clerk's Office of the Circuit Court of the County of Russell, Virginia, in favor of Scott Litton against the goods and chattels of Dixie Splint Coal Company, Inc., certain goods and chattels were levied upon the said M. C. Chafin Deputy Sheriff for N. F. Castle, Sheriff of Russell County, and which said goods and chattels were, after having been advertised, sold to satisfy the said writ of fieri facias,
[92] and that Jean McNeil Pepper, Executrix of A. P. Pepper, deceased, has asserted a claim or lien against the proceeds of the said sale in the sum of $9,000.00, with interest and cost thereon, and that the Clinchfield Coal Corporation has likewise asserted, as a prior lien, a claim of $2,153.00, and that no indemnifying bond has been given, and that it is proper for the issuance of an inter-pleader for such cases made and provided by law; it is, therefore, adjudged and ordered that as well the said Scott Litton, the said Jean McNeal Pepper, Executrix of A. P. Pepper, deceased, and the Clinch-

field Coal Corporation be summoned to appear here on the 30th day of June, 1934, to state and litigate their respective claims as touching the said goods and chattels mentioned and described in the petition and the proceeds of the sale of same, in order to a decision of their respective rights severally touching the same.

And it is further adjudged and ordered that the said M. C. Chafin be, and hereby is, permitted to pay into Court the sum of $3114.50, the net proceeds of the sale of the said goods and chattels, less the commissions of sale and $1.50 levy fee, provided by law, and that the Clerk of this Court shall execute his receipt to the said M. C. Chafin, evidencing the said payment, and which said payment is accordingly this day made into open Court.

All of which is accordingly adjudged and ordered."

[93] (ORDER ENTERED 6-20-34).

"Virginia:

In the Circuit Court of Russell County:

M. C. Chafin, D. S., Complainant,
vs. () ORDER.
Scott Litton, et al, Defendants

This day came the defendant, Scott Litton, by counsel, and filed his answer to the plaintiff's petition."

(ANSWER SCOTT LITTON FILED JUNE 30, 1934.)

"Virginia:

In the Circuit Court of Russell County:

M. C. Chafin, D. S., Complainant,
vs.
Scott Litton, et al, Defendants.

The answer of Scott Litton to a certain petition in interpleader filed in the Circuit Court of Russell County, Virginia, by M. C. Chafin, D. S. for N. F. Castle, Sheriff, Russell County.

For answer to said petition, or so much thereof as he deems it material that he should answer, the undersigned Scott Litton says:

That it is true as alleged by said petition that on the 19th day of March, 1934, an execution was issued from the Clerk's Office of Russell County, Virginia, upon a judgment in favor of your respondent in the sum of $33,468.89, with interest and cost, and placed in the hands of M. C. Chafin, D. S. for N. F. Castle, Sheriff of Russell County, on the said 19th day of March, 1934, for execution, and that the said execution was levied upon the property mentioned in said petition on the said 19th day of March, and that pursuant to said levy the
[94] said property was sold by the said M. C. Chafin, D. S. as alleged by said petition.

That this respondent is not advised as to the truth or falsity of the allegations of said petition that an execution was issued and levied upon a judgment of Jean McNeil Pepper, Executrix, and neither admits nor denies such allegations, but demands strict proof of same:

That Clinchfield Coal Corporation was the holder of a first and paramount lien against the property mentioned and described in the petition, and which was sold by the said M. C. Chafin, D. S., as therein alleged, in the amount of $2153.00, and that the said Clinchfield Coal Corporation is entitled to have its said lien paid and satisfied out of the proceeds of said sale.

That by virtue of the lien of his Writ of Fieri Facias, the respondent, Scott Litton holds a lien against the said property and the proceeds of the sale thereof, paramount and superior to the claims of any person, persons, firms or corporations whatsoever, and paramount and superior to any claim or alleged lien asserted by Jean McNeil Pepper, Executrix, and is entitled to have the proceeds of the sale of said property, after payment of costs, commissions and said lien of Clinchfield Coal Corporation, applied upon his said lien.

This respondent prays, therefore, that an order be entered directing that the proceeds of said sale, after deducting the expense of said sale and sheriff's commissions, and the paramount lien of Clinchfield Coal Corporation be paid to him as a credit upon his said execution lien.

And having fully answered said petition this re-
[95] spondent prays that he be hence dismissed with his costs in this behalf expended.

SCOTT LITTON,
Respondent

By Counsel:
GREEVER & GILLESPIE,
QUILLEN & QUILLEN."

(ORDER ENTERED JULY 18, 1934).

"M. C. Chafin, Deputy Sheriff
vs. () ORDER.
Scott Litton, et al.

It appearing to the Court from the answer of Scott Litton filed in this matter on the 30th day of June, 1934, as well as from the answer of Jean McNeal Pepper, Executrix of A. P. Pepper, deceased, filed on the 13th day of July, 1934, that the Clinchfield Coal Corporation has a prior lien on the funds paid into Court by M. C. Chafin, Deputy Sheriff to the extent of $2153.00, it is therefore so adjudged and ordered; and upon motion of counsel for Clinchfield Coal Corporation this day made the Clerk of this Court is directed and ordered to pay over to Clinchfield Coal Corporation the said sum of $2153.00."

(REPORT OF E. F. HARGIS, CLERK & EXHIBITS ATTACHED).

"Virginia:

In the Circuit Court of Russell County:

M. C. Chafin, Deputy Sheriff, Petitioner
vs.
Scott Litton, et al, Defendants.

[96] "REPORT OF E. F. HARGIS, CLERK.

The undersigned, E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, would respectfully report unto your Honor, that:

On June 15, 1934, M. C. Chafin, D. S. paid to the undersigned Clerk the sum of as per order of Court of that date $3114.50

On July 18, 1934, the undersigned paid to Clinchfield Coal Corporation, through its general counsel, A. K. Morison, the sum of per order of Court of that date: $2153.00

Leaving a balance of 961.50 in my hands in this case, which is deposited in the First National Bank of Lebanon, Virginia.

Respectfully submitted, this July 18, 1934.

E. F. HARGIS,
Clerk."

(RECEIPT FROM CLINCHFIELD COAL CORP.)

July 18, 34."

"Received from E . F. Hargis, Clerk. Twenty one hundred fifty three and no†100 Dollars, amount ordered to be paid by Circuit Court of Russell County, Va., by order dated even date herewith, out of the funds paid to Clerk in case of M. C. Chafin, D. S. v. Scott Litton.

CLINCHFIELD COAL CORPORATION,
By JOHN A. MUSE,
Comptroller.

$2153.00.

(Letter from A. K. Morison to E. F. Hargis)

"July 20, 1934.

Mr. E. F. Hargis, Clerk,
Lebanon, Va.

"Dear Mr. Hargis:

GC-14075-Dixie Splint Coal Company Lease.

[97] Thank you for your letter of July 18th enclosing your check as Clerk to the order of this Corporation for $2,153.00, representing the sum of money

directed to be paid this Corporation by order of the Court in the mtater of M. C. Chafin, D. S. v. Scott Litton, et al.

The receipt, along wtih the check, is being mailed to our Comptroller, Mr. John A. Muse, at Dante, Virginia, and he will execute and return the receipt to you.

Yours very truly,

A. K. MORISON,
General Counsel.

AKM/ms"

(Letter to E. F. Hargis, Clerk from John A. Muse)

"Dante, Virginia, July 23, 1934.

Mr. E. F. Hargis, Clerk,
Lebanon, Virginia.

Dear Sir:

As requested by Mr. Morison I take plèasure in enclosing receipt for $2,153.00.

Very truly yours,

JOHN A. MUSE,
Comptroller.

Copy to Mr. Morison."

(COPY LETTER FROM CLARENCE C. BURNS:)

"July 16, 1934.

RE: Clinchfield Coal Corporation v. Dixie Splint Coal Co., Inc.

"Mr. A. K. Morison, General Counsel,
Clinchfield Coal Corporation,
Bristol, Va.

"Dear Mr. Morison:

The answer came in in this case, and we prepared
[98] an order for the Court to enter directing that the

$2153.00 be paid to Clinchfield Coal Corporation, and the order is now in the hands of E. F. Hargis, Clerk, Judge Lively is absent, and the order will be entered just as soon as he returns.

We are leaving this morning and will be absent several days, hence we are requesting the Clerk to make a check payable to the Clinchfield Coal Corporation as soon as the order is entered and send it direct to you in order to avoid further delay.

We are sending a copy of this letter to Mr. Hargis, and to Mr. John A. Muse, Comptroller.

Yours very truly,

WILSON, BURNS & WILSON,
By CLARENCE C. BURNS.

CCB:e"

(LETTER FROM E. F. H. TO A. K. MORISON).

"July 18, 1934.

Mr. A. K. Morison,
General Counsel,
Clinchfield Coal Corporation,
Bristol, Va.

Dear Sir:

Re: *M. C. Chafin, D. S. v. Scott Litton, et al:*

In accordance with direction of Messrs. Wilson, Burns and Wilson, local Attorneys for Clinchfield Coal Corporation, I am enclosing herewith my check for $2153.00 directed by order of Court entered in the above styled case as of this date, covering claim of Clinchfield Coal Corporation, asserted in this case for royalties against Dixie Splint Coal Company.

I am also enclosing herewith receipt for the above amount, which please sign and return to me so that I may file the same with my report of payment to the Court.

Yours very truly,

Enc. 2
CC WB & W

E. F. HARGIS,
Clerk"

[99] (PETITION OF P. H. SMITH TRUSTEE & EXHIBITS ATTACHED).

"Virginia:

In the Circuit Court of Russell County:

M. C. Chafin, D. S., Plaintiff,
vs. () PETITION OF P. M. SMITH, TRUSTEE.
Scott Litton, et al, Defendants.

To the Honorable A. G. Lively, Judge:

"Your petitioner, P. H. Smith, would respectfully show:

That pursuant to its petition filed in the United
[99] States District Court for the Western District of Virginia, on the 4th day of September, 1934 Dixie Splint Coal Compnay was on the 7th day of September, 1934, duly adjudged a bankrupt, copy of which said order of adjudication is filed herewith as part of this petition, marked "Exhibit Adjudication."

That on the 26th day of September, 1934, your petitioner was duly elected Trustee of said Bankrupt's Estate, and has duly qualified as such Trustee, as provided by law;

That there is now pending in Your Honor's Court a certain proceeding by way of interpleader, under the style of M. C. Chaffin, D. S. plaintiff v. Scott Litton, et al, defendants, wherein adverse claims are being asserted by Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right, and Scott Litton, to a fund amounting to $961.70, now held by E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, pursuant to order entered in said cause;

That by order entered on the 26th day of September, 1934, by John Robert, Referee in Bankruptcy, your
petitioner, as Trustee of the Bankrupt's Estate,
[100] was authorized to intervene in this proceeding, copy of which said order is filed herewith as a part of this petition, marked "Exhibit Order."

That your petitioner is advised and avers that the supposed lien being asserted by Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right, in this proceeding, accrued within 4

months of the filing of said Bankrupt petition, and adjudication as a bankrupt, and is rendered void by said adjudication.

Your petitioner is further advised and avers that the action in which the alleged judgment of the said Jean McNeil Pepper, Executrix etc., was rendered in the Corporation Court of the City of Bristol, Virginia, is now pending and undetermined in the Supreme Court of Appeals of Virginia, and by reason of which your petitioner contends that any supposed lien created by execution issued on said judgment is rendered void.

Your petitioner is not advised as to the validity of the supposed lien being asserted in this proceeding by Scott Litton, but is advised that the said Scott Litton has no objection to the fund now in the hands of E. F. Hargis, Clerk, being paid to your petitioner and administrator in Bankruptcy.

Your petitioner avers that certain preferred labor claims have been filed in said Bankruptcy proceeding, which are entitled to be paid out of the fund above mentioned, and that the ends of justice and proper administering of said estate in bankruptcy demand that the fund now held by E. F. Hargis, Clerk, be paid to your petitioner and administered in a Court of Bankruptcy.

Your petitioner prays, therefor, that he permitted
[101] to file this his petition in this suit, and that Jean McNeil Pepper, Executrix, of the Estate of A. P. Pepper, deceased, and in her own right, Scott Litton and M. C. Chaffin, D. S. be made parties defendant to this petition and be required to answer the same, answer under oath, however, being hereby waived, and that the said fund now in the hand of E. F. Hargis, Clerk, be ordered paid to your petitioner, after deducting any cost properly *chargable* against said fund.

And he will ever pray, etc.

P. H. SMITH,
Trustee for Dixie Splint
Coal Co., Inc.

By Counsel,
I. M. QUILLEN.

(EXHIBIT ADJUDICATION.)
See side page 9 herein.

[102] (EXHIBIT ORDER).

In the United States District Court for the Western District of Virginia:

In the matter of
Dixie Splint Coal Company, Inc. () In Bankruptcy.
Bankrupt.

At Lebanon, Virginia, on the 26th day of September, 1934, before John Roberts, Referee in Bankruptcy.

At the first creditors' meeting held in this matter
[103] today P. H. Smith, Trustee in the above matter, gave notice that he would forthwith file a petition with the Referee asking for authority to intervene in a suit now pending in the Circuit Court of Russell County, Virginia, under the style of M. C. Chafin, Deputy Sheriff, v. Scott Litton, et als, and it further appearing that in the above styled suit the sum of $961.70 has been paid into the hands of E. F. Hargis, Clerk, which fund was derived from sale of assets belonging to the bankrupt, said sale having been made prior to the bankruptcy, the petition for adjudication of the bankrupt having been filed on the 4th day of September, 1934, and that the trustee contends that he is entitled to said fund, and it now appearing that it is necessary and advisable that the said P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Inc., Bankrupt, intervene in said suit, it is ordered that the said P. H. Smith, Trustee, be and he is hereby authorized and directed to file such petition in said suit as he and his attorney, I. M. Quillen, Lebanon, Va., may deem necessary and/or advisable, and asking for such relief as he and his attorney may deem necessary or advisable.

JOHN ROBERTS,
Referee in Bankruptcy."

(ORDER ENTERED OCT. 3RD).

"Virginia:

In the Circuit Court of Russell County.

M. C. Chaffin, D. S Plaintiff
vs. () ORDER
Scott Litton, et al Defendant.

Upon motion of P. H. Smith, Trustee in Bank-
[104] ruptcy, for Dixie Splint Coal Company, Bankrupt, the said P. H. Smith, Trustee, is hereby permitted to file his petition in this suit, and the Clerk of this Court is hereby directed to issue process against the defendants named therein, requiring them, and each of them, to appear and answer the said petition on or before the 18th day of October, 1934."

(ANSWER OF SCOTT LITTON TO PETITION OF P. H. SMITH).

"Virginia:

In the Circuit Court for Russell County.

M. C. Chaffin, D. S., Plaintiff,
vs. ANSWER OF SCOTT LITTON.
Scott Litton, et al, Defendants.

The answer of Scott Litton to a certain petition exhibited against him, and others, in the Circuit Court for Russell County, Virginia, by P. H. Smith, Trustee.

For answer to said petition, or so much thereof as he deems it material that he should answer, this respondent says:

That he has read said petition, and so far as he is advised the allegations thereof are true.

And thus having fully answered he prays to be hence dismissed with his reasonable costs in this behalf expended.

SCOTT LITTON."

Filed Nov. 1, 1934."

[105] (ORDER ENTERED NOV. 1, 1935.)

"Virginia:

"In the Circuit Court of Russell County:

M. C. Chafin, Plaintiff,
vs. ORDER.
Jean McNeil Pepper, Executrix, etc.,
and Scott Litton, Defendants.

Pursuant to agreement of all parties in interest, it is ordered that E. F. Hargis, Clerk of this court, pay to P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Incorporated, Bankrupt, the sum of $961.50, now held by him pursuant to the order of this court, after deducting therefrom the cost of this proceeding.

Agreed to
GEO. M. WARREN,
Counsel for Jean McNeil Pepper,
Executrix, etc.
I. M. QUILLEN,
Counsel for Scott Litton.
A. T. GRIFFITH,
Counsel for M. C. Chaffin."

(SUMMONS ON PETITION OF P. H. SMITH, TRUSTEE.

"The Commonwealth of Virginia:

To the Sheriff of the County of Russell—Greeting:

We Command You To Summon:

Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right, Scott Litton and M. C. Chaffin, D. S. to appear at the Clerk's Office of our Circuit Court of the County of Russell, at the Courthouse thereof, at the Rules to be holden for said Court, on the third Monday in October, 1934, to [196] answer the petition of P. H. Smith, Trustee for Dixie Splint Coal Co., Inc., filed in the suit of M. C. Chafin, D. S. vs. Scott Litton, et al.

And have then there this writ.

Witness E. F. Hargis, Clerk of Said Court, at the Courthouse, the 3rd day of October, 1934, and in the 159 year of the Commonwealth.

E. F. HARGIS,
Clerk."

"(Endorsement on back of Summons):

"Legal service of the within notice is hereby accepted, John McNeil Pepper, Exor. and in her own right.

By WARREN & CANTWELL,
Of Counsel.

A. T. GRIFFITH,
For M. C. Chafin, D. S."

(FIERI FACIAS)

"Commonwealth of Virginia,

To the Sheriff of Russell County, *Greeing:*

We Command You, That of the goods and chattels of Dixie Splint Coal Company, Incorporated, late in your bailiwick, you cause to be made $33,468.89, with legal interest thereon from the 2nd day of June, 1933, *til* paid; which Scott Litton, lately in our Circuit Court for Russell County, has recovered against Dixie Splint Coal Company, Incorporated; also $13.25 which the said Scott Litton in our said Court, were adjudged for his costs in this behalf expended; whereof the said Dixie Splint Coal Company, Incorporated is convicted as appears to us of record; and that you have the same at Rules to be held in the Clerk's Office of our said Court, at
[107] the Courthouse, on the first Monday in June next, to render to the said Scott Litton of the debt, interest and costs aforesaid. And have then there this writ. Witness E. F. Hargis, Clerk of our said Court, at the Court house, this the 19th day of March, 1934, and of the Commonwealth the 158 year.

E. F. HARGIS,
Clerk."

(Return Endorsed On Back:)

"March 19, 1934, Executed in Russell County, Virginia, by levying the within execution on the following properly: 1 Tipple and equipment — 1 MG Set instruments and equipment — 3 Haulage locomotives — 1 lot of 75 mine cars — 1 lot shop equipment — 3 pumps and pipe connections — 1 mining machine — 1 lot copper wire, 1 lot office equipment — 1 sand dryer — 5500 L

feet No. 16 track and switches — 6850 L feet steel track 25 lb. rails, switches and material — 2600 L ft. 45 steel track with switches, connections and materials, 2 mine fans and motors — 1 lot tools, supplies and materials, 2 motor frames and accessories.

Levied on to satisfy the within execution in favor of Scott Litton v. Dixie Splint Coal Company, Clinchfield, Va. Given under my hand this the 19th day of March, 1934.

M. C. CHAFFIN,
D. S. for N. F. Castle, S. R. C."

"The property in the levy endorsed hereon was pursuant to the said levy, after due advertisement, sold by me at public auction on the 14th day of June, 1934, to Scott Litton, Agent, for $3200.00 for the satisfaction of the within execution; which amount I collected and
[108] paid to E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, in an interpleader proceeding instituted by me against Scott Litton, et al, pursuant to an order of the Circuit Court of Russell County, Virginia, entered in said proceeding after deducting my costs and commissions in the amount of $85.50.

M. C. CHAFFIN,
D. S. for N. F. Castle, S. R. C."

"Came to hand, March 19, 1934, at 8 o'clock P. M. M. C. Chaffin, D. S. for N. F. Castle, S. R. C. 1934 1st June Rules. Dante Judgement, June 2, 1933."

Testimony of E. F. HARGIS, Resumed:

By I. M. Quillen:

Q. Mr. Hargis, are you acquainted with Mr. A. K. Morison?

A. I know Mr. Morison.

Q. I mean Mr. Kyle Morison?

A. Yes, sir.

Q. There has been filed here as an Exhibit with the Report a letter from Mr. A. K. Morison to you?

A. Yes, sir.

Q. I will ask you whether or not that is the same Mr. A. K. Morison whose name is signed to the plead-

ings as counsel for Jean McNeil Pepper in the chancery suit referred to and the motion to quash?

A. That is my understanding.

Q. Did you draw a check payable to P. H. Smith, Trustee in Bankruptcy, pursuant to order entered in the interpleader proceedings on the 1st day of Nov. 1934?

A. Yes, sir.

Q. Did you deliver that check to P. H. Smith, or [109] his counsel?

A. I delivered it to his counsel.

CROSS EXAMINATION.

By Mr. Heuser:

Q. Do the records in the interpleader suit, about which you have testified, show who were counsel for the various parties?

A. I do not recall, I suppose so though.

Q. Do they show who was counsel for Scott Litton?

A. I would have to look to see. It shows Mr. I. M. Quillen, counsel for P. H. Smith, Trustee.

By Mr. I. M. Quillen:

Your Honor please, those records show for themselves.

The Court:

I think he may ask.

A. Mr. A. T. Griffith, counsel for Mr. Chaffin. Counsel for Mrs. Jean McNeil Pepper, H. G. Morison, Jr., Warren & Cantwell and E. W. Widener; I. M. Quillen, counsel for Scott Litton.

Q. Mr. Hargis, for some reason the defendant has offered in evidence all of the record of the interpleader suit, about which we have been talking, except an order entered therein on the 10th day of November, 1934. Is that order duly spread upon your order books?

A. Yes sir.

Q. What order book?

A. Common Law Order Book No. 20, p. 390.

Q. Is this the original order which was handed to you by the Judge of the Court?

A. I don't know whether it was handed to me or [110] not he told me to enter it.

Q. Will you please read that order?

"Circuit Court of the County of Russell, Virginia, Saturday the 10th day of November, 1934.

Present: Hon. A. G. Lively, Judge.

M. C. Chaffin
vs.
Jean McNeil Pepper, Executrix,
and Scott Litton.

The sum which was by order entered in this cause, on the 1st day of November, 1934, directed to be paid by the Clerk to P. H. Smith, Trustee, in Bankruptcy of Dixie Splint Coal Company, Inc., bankrupt, having been returned to the Clerk of this court by said trustee, pursuant to direction of the Court and pursuant to order of the referee in bankruptcy, it is ordered that the Clerk of this court shall deposit said sum in the First National Bank of Lebanon, and hold said deposit, subject to the further order of Court."

Q. Mr. Hargis, I wish to ask you about the order of Nov. 1st, 1934, the original order which was handed to you for entry, and ask you what counsel appears to have signed that order purporting to agree to its entry?

A. George M. Warren, of counsel for Jean McNeil Pepper, I. M. Quillen, counsel for plaintiff, and A. T. Griffith, counsel for M. C. Chaffin.

Q. What is the date of the check which was written by you as Clerk to P. H. Smith, Trustee in bankruptcy?

A. Nov. 5, 1934.

Q. When was it returned to your office?

[111] A. By letter from Mr. Smith, dated Nov. 9, 1934.

Q. Do you have with you now the check which was written to P. H. Smith, Trustee, and the letter which he wrote to you returning the check?

A. Yes, sir.

Q. We offer this letter and check in evidence.

Which letter and check are in the words and figures following:

"Clinchfield, Virginia, Nov. 9th, 1934.

Mr. E. F. Hargis, Clerk,
Russell County Circuit Court,
Lebanon, Virginia.
Dear Sir:

I received in the mail yesterday your check of November 5th, in the amount of $953.25, same being the balance of the proceeds of certain tangible property of the Dixie Splint Coal Company, which was held on June 14th, 1934, by M. C. Chaffin, Deputy Sheriff.

Mr. Quillen advised that the court desired the return of these funds for the present, and for this reason I am returning the check.

Yours very truly,

P. H. SMITH,
Trustee for Dixie Splint Coal Co., Bankrupt."

(CHECK)

No. 2316

"E. F. Hargis, Lebanon, Va., Nov. 5, 1934.
Clerk Circuit Court,
Russell County, Va.
Pay to the
Order of P. H. Smith, Trustee, $953.25
Nine hundred fifty three & 25/100 ..... Dollars
Balance of funds paid into court case of M. C. Chaffin v. Scott Litton.

Your endorsement on this check acknowledges pay-
[112] ment in full for the above.

E. F. HARGIS,
Clerk. — "Special"

To the First National Bank,
Lebanon, Va."

RE-DIRECT EXAMINATION.

By I. M. Quillen:

Q. Do you know George M. Warren?

A. Yes, sir.

Q. State whether or not he has appeared in this Court as counsel for Mrs. Pepper in either one of these three proceedings?

A. Yes, sir.

By the Court:

Do I understand counsel for defendants as insisting on the position that the order of Nov. 10 was entered without authority?

A. Yes, sir.

The Court:

I think in view of the objection of counsel it is necessary for the court to state the reasons for entering this order of November 10th.

When the order of November 10th was offered to the Court for entry I do not remember what matter I was engaged in, but I was busy in some matter, it appeared to me as an agreed order, and without giving it very much consideration at the time, it was endorsed [113] and entered. At some later time, as I recall, I thought about this matter, and it appeared to me that there were actions pending in this court between the same parties who were assuming positions entirely inconsistent with the position assumed in this order. The matter was taken up with counsel for Mr. Litton, who was then also appearing as counsel for the Trustee, and, in order that this court might not get into a position of inconsistency, that is by entering an order which appeared to be agreed to by parties who were insisting upon positions inconsistent with it, it was thought proper that the court take this matter up with the Referee, and that was done by a letter on Nov. 6th, 1934. Prior to that time the matter had been discussed some with Mr. I. M. Quillen, of counsel for Mr. Litton and also of counsel for the Trustee, and Mr. Quillen had agreed to have Mr. Smith return this check, which had been directed to be paid to him, and for that reason no order was entered directing Mr. Smith to return the check. On Nov. 6, 1934, the following letter was written to Hon. John Roberts,

Referee in Bankruptcy, copy of which was given to counsel for the Trustee, and Mr. Litton.

"In re: *Dixie Splint Coal Company, Inc., Bankrupt:*

November 6, 1934.

Hon. John Roberts, Referee in Bankruptcy,
Norton, Virginia.

Dear Mr. Roberts:

As you may know a judgment was obtained by confession before the Clerk of this court in favor of Scott Litton against Dixie Splint Coal Company, as I recall it, during last year. During this year an execution was issued upon that judgment and placed in the hands of the Sheriff of this county, who under it sold certain property of the Dixie Splint Coal Company. The Sheriff, not being advised as to whom he should pay the proceeds of said sale, filed an interpleader proceeding in this court and that proceeding is still pending here.

It seems that the only party so far as I know who [114] has been denying the right of Scott Litton to have the proceeds of this sale, is one Jean McNeil Pepper, *Executrix*, etc., whom it appears is a judgment creditor of Dixie Splint Coal Company, and who claims to be entitled to the proceeds of the sale of the property of Dixie Splint Coal Co.

In the interpleader proceeding an agreed order was entered, agreed to by counsel for Scott Litton and counsel for Pepper, Executrix, directing the payment of a part of said fund to the Clinchfield Coal Corporation, on an obligation which it had against said Dixie Splint Coal Co. The residue of said fund has been held by the Clerk of this court, pursuant to the order in the interpleader proceedings.

Recently a motion has been made in this court by counsel for Pepper, Executrix, to quash the execution issued upon the Litton judgment, and that motion is still pending here. Although there has been no actual intervention, I have been advised from statement of counsel, that an order has been entered in the bankruptcy proceeding, directing the trustee in bankruptcy to intervene in said proceeding to quash and to ask that said execu-

tion be quashed. There has been no actual intervention by the trustee or request upon his part to quash the execution, so far as I know.

Mr. I. M. Quillen, an attorney of this place, is counsel for Scott Litton in the proceeding to quash the foregoing execution and for Mr. Litton is opposing the quashing thereof. He is also attorney for the trustee in Bankruptcy, as I am advised whose duty it would be to ask that the execution be quashed, under the order re-
[115] cently entered. As I understand it Mr. Quillen became attorney for the bankrupt corporation long prior to the time when the movement to quash the execution was made, and of course at that time no one anticipated the conflict which has arisen.

I am advised by Mr. Quillen that an order has been entered by you as referee, directing that the trustee in bankruptcy collect and receive from the Clerk of this court the balance in his hands remaining from the sale of the Dixie Splint Coal Company property under the execution on the Scott Litton judgment. Recently Mr. Quillen presented me an order agreed to by him, as counsel for Scott Litton, and by Geo. M. Warren as counsel for Pepper, Exor. and by A. T. Griffith, as counsel for the Sheriff, whereby said fund was directed to be paid over to the trustee in bankruptcy, and this order was entered by me, and pursuant to it the clerk drew and delivered a check to Mr. Smith, the trustee in bankruptcy.

I was busy with other matters at the time the order was presented, and it appearing to me as an agreed order I did not give it very much thought. Later on, I thought some of it, and in view of what it seems may be a conflict in the actions taken, I have asked that the trustee in bankruptcy return the check to the Clerk and he has agreed to do that. So no actual change will have taken place in the status, by reason of the last above mentioned order.

If the trustee is to be directed and expected to contest the validity of the judgment and execution of Scott Litton against Dixie Splint Coal Company, and the ground urged for the quashing of said execution
[116] is that the judgment is void, it would seem inconsistent to me for him to accept any of the proceeds of the sale of the property under said execution. His action in accepting the proceeds of the sale under said execution might bar his right to question the validity of

the judgment, *open* though such judgment were in fact void. Eubank v. Fuller 156 Va. 635: 34 C. J. p. 510.

Now you will of course understand that I am perfectly willing to let the order stand directing the payment of this money out to the trustee in bankruptcy, if you think proper, and on the other hand, I am perfectly willing to set that order aside and direct the Clerk to hold the funds, pending the outcome of the litigation on the motion to quash, if you think proper, but I did not want to do this or to take any action that would in any way tend to embarass or hamper the trustee if he desires to contest the validity of the Litton judgment, except after a thorough understanding of the facts and of the consequences which might result.

The funds will therefore be held as they are until I hear from you.

With *knidest* personal regards, I am,

Very truly yours,

A. G. LIVELY."

On November 9th, 1934, I received a copy of letter to E. F. Hargis, Clerk from P. H. Smith, Trustee. The original of that letter, as I understand, has already been introduced.

Under date of November 9th I also received the following letter from Hon. John Roberts, Referee in Bankruptcy:

"November 9, 1934.

Judge A. G. Lively,
Lebanon, Virginia.

Dear Sir:

[117] Re: *Dixie Splint Coal Company, Bankrupt.*

Your letter of November 6 received and I thank you for the same. We had a brief hearing yesterday before me and at the hearing I entered an order, copy of which is as follows:

"It is ordered that P. H. Smith return the check to E. F. Hargis, Clerk of the Circuit Court of Russell County that has been delivered to him by order of the Circuit Court of Russell County in the interpleader proceeding pending in said court and that the trustee hold in abeyance any further action under the order entered

on September 26, 1934, until the further order of the referee."

A second order with reference to this case was entered as follows:

"It appearing that I. M. Quillen has resigned as counsel for the trustee in this matter and that the trustee needs counsel to advise him with reference to what, if any proceeding should be taken with reference to the judgment of Scott Litton obtained in the Circuit Court of Russell County, Virginia, against the Dixie Splint Coal Company, it is ordered that the selection of M. M. Heuser and his partner, C. W. Hamilton, as attorneys for the Trustee be, and the same are hereby approved by the referee. It is further ordered that the said counsel give the matter involved in this case their prompt attention and that they file such petition on behalf of the trustee as they may deem advisable with reference to intervening in any matter that appears to be in [118] controversy in this case."

You will note from these orders of course that there will be no further proceeding taken with reference to the trustee in bankruptcy until he can be advised by his counsel and I hope it will be satisfactory to you to let the matter rest for a little while until the trustee's counsel has time to look into the case and decide on what steps or proceeding they will take.

It is very plain that the validity of the judgment of Scott Litton v. Dixie Splint Coal Company, Inc., must be tested either in your court, or in the bankruptcy court, and right now it appears to me that the proper place to test the matter is in the Circuit Court of Russell County.

Please let me again thank you for your letter with reference to the matter.

Yours very truly,

JOHN ROBERTS,
Referee in Bankruptcy."

JR/LB

Pursuant to these letters, and the situation presented by these letters the order of November 10 was entered by this Court on its own motion.

By I. M. Quillen:

We object to the reading of this correspondence into

the record, and move that it be expunged because irrelevant and immaterial to the matters at issue. We take the position that the validity of the judgment in question must be determined from the matters appear-

[119] ing upon the face of the record in the suit itself, and cannot be determined from consideration of matters dehors the record. The correspondence detailed, deals with matters of fact that are susceptible to further explanation and additional information, which would, we avow, show a different state of facts than that understood by the Court at the time. There are, as we contend, additional matter of fact, which the Court probably did not have in mind at the time, and which, if allowed to stand in the record, would have to be further shown in evidence to complete the statement of the transaction.

The Court:

Motion to expunge will be overruled. The purpose of the Court in making this statement, and in reading this correspondence, so far as *tthis* case is concerned, was for one purpose only, and that is whether it appeared necessary and proper for the court to enter this order, and whether it appeared necessary and proper for this court to inquire fugther into this matter. Of course, I had to go upon what facts I had before me at that time, and do what appeared right and proper under the circumstances. If there are other facts in connection with the situation, or bearing upon the situation, it would be entirely proper to introduce such facts.

By Mr. I. M. Quillen:

If Your Honor Please, while it would be out of the ordinary course of introducing this evidence, I regret the necessity of having to testify in the case myself, but at this time, in view of the fact that this question is before the Court, it will be necessary for me to be sworn in the case as a witness.

The Witness I. M. QUILLEN, being first duly

[120] sworn, testified as follows:

STATEMENT.

If Your Honor please, at the first meeting of the creditors of the Dixie Splint Coal Company, at which

the Trustee was elected, Jean McNeil Pepper did not appear, or participate in the meeting, and was not represented. At that meeting of the creditors I made statement to the Referee as fully as I was able, outlining to him the status of the bankrupt estate with reference to certain suits, several of which were pending at the time. I stated to the Referee that there was a suit pending in Norfolk, which originated as a garnishee petition, but which became involved by petition in the chancery court and in the Federal Court, and that there were some funds there due the Bankrupt, which were being claimed by Jean McNeil Pepper and Scott Litton. That the same situation prevailed in the Corporation Court of the City of Bristol, where some funds in the Dominion National Bank were in question; that the same situation prevailed in an interpleader proceeding here, brought by McKinley Chafin against these parties involving the proceeds of the sale under Mr. Litton's execution, and told him the nature of that, and that the Clinchfield Coal Corporation had been paid its money. I told him further that Mrs. Jean McNeil Pepper had instituted a chancery suit in this court, contesting the validity of Scott Litton's judgment. I told him that suit was pending; that the pleadings were made up, and the issue joined, but
[121] that nothing had been done for sometime since the issue was completed. As I recall, the Referee asked me what Mrs. Pepper was going to do, and I replied that I did not know. The Referee, in reply to that said, "that is a matter which will have to be settled in this court."

I then suggested to the Referee that there were certain preferred labor claims which were entitled to be paid, and unless these funds were gotten into the hands of the Trustee there would be nothing to pay these labor claims with, and that they had first consideration. These funds, at that time, constituted the total assets of the estate, with the exception of a few open accounts receivable, which were worth very little. I suggested to the Referee that it was important that the Trustee should intervene and ask that these funds should be brought into the hands of the Trustee in Bankruptcy, and Mr. Smith was asked who he selected as his counsel, and he said he selected me. On that same date, which was the 26th day of September, an order was entered directing P. H. Smith, Trustee, by me as his counsel, to intervene in

each of these three proceedings, which said orders are as follows:

(EXHIBIT I. M. Q. NO. 17)

"In the United States District Court for the Western District of Virginia:
In the matter of
Dixie Splint Coal Co., Inc. () In Bankruptcy.
Bankrupt.

At Lebanon, Virginia, on the 26th day of Septem-
[122] ber, 1934, before John Roberts, Referee in Bankruptcy.

At the first creditors' meeting held in this matter today P. H. Smith, Trustee, in the above matter, gave notice that he would forthwith file a petition with the Referee asking for authority to intervene in a suit now pending in the corporation court of the city of Bristol, wherein Gene McNeil Pepper is plaintiff and Dixie Splint Coal Company, Inc., and Dominion National Bank are defendants, and in which adverse claims of priority are being asserted by the said Gene McNeil Pepper, Executrix, and Scott Litton, and it appearing that the bankrupt had on deposit in and with the Dominion National Bank of Bristol, Virginia, in the sum of $868.37, at the time said suit was instituted, and at the time of the filing of the bankrupt's petition on September 4, 1934, and it now appearing that it is necessory that the said P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Inc., Bankrupt, intervene in said suit, it is ordered that the said P. H. Smith, Trustee be, and he is hereby authorized and directed to file such petition in said suit as he and his attorney I. M. Quillen, Lebanon, Va., may deem necessary and/or advisable and asking for such relief as he and his attorney may deem necessary and advisable.

JOHN ROBERTS,
Referee in Bankruptcy."

"The foregoing is a true copy of an order entered in the above matter on September 26, 1934.

JOHN ROBERTS,
Referee in Bankruptcy."

[123] (EXHIBIT I. M. Q. NO. 17A)

"In the United States District Court for the Western District of Virginia.

In the matter of

Dixie Splint Coal Company. Inc. () In Bankruptcy.
Bankrupt.

At Lebanon, Virginia, on the 26th day of September, 1934 before John Roberts, Referee in Bankruptcy.

At the first creditors' meeting held in this matter today P. H. Smith, Trustee in the above matter, gave notice that he would forthwith file a petition with the Referee asking for authority to intervene in a suit now pending in the circuit court of Russell County, Virginia, under the style of M. C. Chaffin, Deputy Sheriff v. Scott Litton, et als, and it further appearing that in the above styled suit the sum of $961.70 has been paid into the hands of E. F. Hargis, clerk, which fund was derived from sale of assets belonging to the bankrupt, said sale having been made prior to the bankruptcy, the petition for adjudication of the bankrupt having been filed on the 4th day of September, 1934, and that the trustee contends that he is entitled to said fund, and it now appearing that it is necessary and advisable that the said P. H. Smith, Trustee in bankruptcy for Dixie Splint Coal Company, Inc., Bankrupt, intervene in said suit, it is ordered that the said P. H. Smith, Trustee, be, and he is hereby authorized and directed to file such petition in said suit as he and his attorney, I. M. Quillen, Lebanon, Va., may deem necessary and/or advisable, and asking for such relief as he and his attorney may deem necessary or advisable.

JOHN ROBERTS,
Referee in Bankruptcy."

The foregoing is a true copy of an order entered in the above matter on Sept. 26, 1934.
This Sept. 26, 1934.

"JOHN ROBERTS."

[124] (EXHIBIT I. M. Q. NO. 17B)

"In the District Court for the United States in the Western District of Virginia:

In the matter of

Dixie Splint Coal Company, Inc. () In Bankruptcy.
Bankrupt.

At Lebanon, Virginia, on the 26th day of September, 1934, before John Roberts, Referee in Bankruptcy.

At the first creditors' meeting held in this matter today P. H. Smith, Trustee in the above matter, gave notice that he would forthwith file a petition with the referee asking for authority to intervene in a suit now pending in the United States District Court for the Eastern District of Virginia, under the style of Central Hanover Bank & Trust Company, et al v. Norfolk Southern Railroad Company, et als by consolidated causes equity 278 and which said petition has now been filed; and it further appearing that Morris S. Hawkins and L. B. Winholz, Receivers of Norfolk Southern Railroad Company are and were at the time of the filing of the bankrupt's petition on September 4, 1934, indebted to the bankrupt in the sum of $7,562.08, and that the payment of said sum has been held up on account of the petition having been filed in the above styled suit by Gene McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right, and also a petition filed by Scott Litton, and it now appearing that it is necessary and advisable that the said P. H. Smith, Trustee in bankruptcy for Dixie Splint Coal Company, Inc., bankrupt, intervene in said suit, it is ordered that the said P. H. Smith, Trustee, be, and he is hereby authorized and directed to file such petition in said suit as he and his attorney, I. M. Quillen, Lebanon, Va., may deem
[125] necessary and/or advisable and asking for such relief as he and his attorney may deem necessary and advisable.

JOHN ROBERTS,
Referee in Bankruptcy."

"The foregoing is a true copy of an order entered in the above matter on Sept. 26, 1934.

This Sept. 26, 1934.

JOHN ROBERTS,
Referee in Bankruptcy."

STATEMENT OF I. M. QUILLEN, Continued.

No mention was made of the chancery suit of Mrs. Pepper attacking the judgment.

I proceeded, pursuant to that order, to intervene in each of these three suits, and counsel for Mrs. Pepper in each of them signed an agreed order that the money might be paid to the Trustee. On October 17, 1934, I had a letter from the Referee reading as follows:

(I. M. Q. NO. 1)

"October 17, 1934.

Messrs. Quillen & Quillen, Attys.,
Lebanon, Virginia.

Gentlemen:

Re: Dixie Splint Coal Co. Inc., Bankrupt.

Please find attached a copy of a petition that has been filed in the above matter by Gene McNeil Pepper, through her counsel Mr. A. K. Morison, under date of October 15. You will also find inclosed a copy of an order that I have entered in response to this petition.

You will of course note that I have entered this order without notice to any of the parties concerned because they will all have their day in court before the
[126] Circuit Court of Russell County, Virginia, and I consider that that is the proper court in which to settle the questions involved.

Yours very truly,

JOHN ROBERTS,
Referee in Bankruptcy.

JR/LB
CC A. K. Morison,
Bristol, Virginia."

In that letter, as stated therein, was enclosed an order of the Referee, under the same date, which reads as follows:

(I. M. Q. NO. 2).

"In the United States District Court for the Western District of Virginia:

In the matter of

Dixie Splint Coal Company, Inc. () In Bankruptcy
Bankrupt.

At Norton, Virginia, on the 17th day of October, 1934, before John Roberts, Referee in Bankruptcy.

It appearing from petition filed in this matter by Jean McNeil Pepper that the petitioner has heretofore instituted a chancery suit in the Circuit Court of Russell County, Virginia, her bill having been filed in said suit on the 12th day of June, 1934, in which said suit she seeks to set aside and to have declared null and void a certain judgment in favor of Scott Litton against Dixie Splint Coal Company, Inc., the Bankrupt, which said judg-
[127] ment appears to have been confessed in the clerk's office of the Circuit Court of Russell County, Virginia, prior to the date last above mentioned; and it further appearing that the validity of the said judgment is questioned and that the said Scott Litton has filed proof of claim in this matter, which said proof is based upon said judgment, and it is necessary and desirable that the validity of the said judgment be passed upon before the claim of Scott Litton can be definitely allowed in the bankruptcy case as to whether or not the said Scott Litton is entitled to any priority or security on account of said judgment and the execution that has been issued thereon; and it further appearing that the Circuit Court of Russell County, Virginia, is the proper court in which the validity of the said judgment and execution should be decided, it is ordered that P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Inc., Bankrupt, be, and he hereby is directed to intervene in said suit above named and to submit to the jurisdiction of the Circuit Court of Russell County, Virginia, for the purpose of having the validity of the alleged judgment in

favor of Scott Litton against Dixie Splint Coal Company, Inc. in the sum of $33,463.89, properly adjudicated by said court. It is further ordered that the said P. H. Smith, Trustee, advise the circuit court of Russell County, Virginia, that it is requested to proceed with the adjudication of the validity of the judgment in favor of the said Scott Litton against Dixie Splint Coal Company, Inc., and with the adjudication of the motion to quash the execution issued on the said judgment.

It is further ordered that the Referee, as notice [128] of the entering of this order mail a copy of this order to P. H. Smith, Trustee, Clinchfield, Virginia, to Quillen & Quillen, Attorneys, Lebanon, Virginia, and to A. K. Morison of counsel for the petitioner, Jean McNeil Pepper, at Bristol Virginia, and a copy thereof to E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia, Lebanon, Virginia.

JOHN ROBERTS,
Referee in Bankruptcy.

In that letter, which I have read, was enclosed also copy of petition of Jean McNeil Pepper, asking the Referee to have the Trustee intervene upon her behalf, which is as follows:

(I. M. Q. NO. 3)

"In the United States District Court for the Western District of Virginia:

In the matter of

Dixie Splint Coal Company, Inc. () In Bankruptcy.

To the Honorable John Roberts, Referee in Bankruptcy:

Petitioner, Jean McNeil Pepper, a resident and citizen of Bristol, Washington County, Virginia, respectfully shows:

I.

That on the 19th day of February, 1934, petitioner obtained judgment in the Corporation Court of the City

of Bristol against Dixie Splint Coal Company in the principal amount of $9,000.00 with interest and costs and that the total amount due under said judgment as of this date amounts to approximately $12,000.00.

II.

Petitioner shows that on the 25th day of May,
[129] 1934, execution duly issued upon said judgment, directed to the Sheriff of Russell County, Virginia, and the said execution was duly levied on certain mine machinery and other mining equipment belonging to the Dixie Splint Coal Company, in Russell County, Virginia. At that time Petitioner learned for the first time that an execution had been levied on the same coal mining equipment and machinery of the said Dixie Splint Coal Company, upon a judgment against the said Company in favor of Scott Litton, in the Circuit Court of Russell County, Virginia, in the sum of $33,464.89.

III.

The property of the said Company so levied upon was duly advertised and sold and the said Scott Litton or someone in his behalf purchased the said coal mining machinery and equipment at the approximate price of $3,100.00, paying the said sum of money into Court.

Upon the intervention of Clinchfield Coal Corporation, Lessor of the leasehold estate of the said Dixie Splint Coal Company, for rents and royalties for which a lien has been retained in said lease, the said sum of money was paid to the said Clinchfield Coal Corporation.

IV.

Petitioner, thereupon, on the 12th day of June, 1934, filed her Bill in Chancery in the Circuit Court of Russell County, Virginia, seeking to set aside and to have de-
clared null and void the judgment in favor of the
[130] said Scott Litton in the sum aforesaid, and the said cause is now pending in said Court.

V.

Petitioner shows that after the sale of the coal mining machinery and other equipment as aforesaid, she

had issued on her said judgment a summons on suggestion against the Norfolk-Southern Railway and the Dominion National Bank, and, thereafter, or about the same time, the said Scott Litton had similar summons on suggestion issued and served upon the same debtors of the said Dixie Splint Coal Company; and, that the summons on all of said companies and institutions are now pending decision, involving the sum of approximately $8,000.00.

VI.

Upon notice, Petitioner on the 6th day of October, 1934, filed her motion in writing in the Circuit Court of Russell County, Virginia, to quash all executions issued and outstanding on the judgment of Scott Litton against Dixie Splint Coal Company upon the following grounds:

First: That P. H. Smith as Secretary and Treasurer of Dixie Splint Coal Company, had appeared in the Clerk's office of the Circuit Court of Russell County, and without power of attorney and without the authority required by law, attempted as such Secretary and Treasurer to confess judgment in behalf of Dixie Splint Coal Company, by virtue of his office as Secretary and Treasurer in such Company; and, that such attempted confession of judgment was absolutely void.

Second: That it was only possible for the Dixie
[131] Splint Coal Company to make a confession of judgment by a duly authorized and empowered attorney in fact, acting under and upon a written power of attorney duly executed and acknowledged by the Dixie Splint Coal Company as deeds and other papers are required to be executed and acknowledged for recordation in Virginia.

Upon said motion attorneys Quillen & Quillen, representing P. H. Smith as Trustee in Bankruptcy of the Dixie Splint Coal Company, opposed said motion upon the ground that bankruptcy having intervened prior to the institution of said motion, the Circuit Court of Russell County was without jurisdiction to quash the executions aforesaid and to declare the judgment of the said Scott Litton null and void.

VII.

Petitioner further shows that upon the objection of the attorneys for the said Trustee in Bankruptcy, the said Circuit Court of Russell County, Virginia, stated in effect that it entertained no doubt as to the invalidity of the judgment attempted to be confessed as aforesaid, but, in view of the bankruptcy proceedings which had been instituted it felt that it should make no decision in the matter.

VIII.

Petitioner is advised that it is necessary to determine the validity of the alleged judgment in favor of Scott Litton against the Dixie Splint Coal Company for the orderly administration of the estate of the
[132] Dixie Splint Coal Company, in bankruptcy; that the validity of said judgment cannot be collaterally attacked but must be attacked directly in the court in which the said judgment was awarded.

Premises considered, Petitioner prays:

First: that the Trustee in Bankruptcy for the said Dixie Splint Coal Company be directed to appear in the Circuit Court of Russell County and submit to the jurisdiction of that Court the adjudication of the validity of the alleged *judgmnet* in favor of the said Scott Litton against the Dixie Splint Coal Company in the sum of $33,463.89.

Second: that the Circuit Court of Russell County, Virginia, be requested to proceed with the adjudication of the validity of the judgment in favor of the said Scott Litton against Dixie Splint Coal Company, and with the adjudication of the motion to quash the executions issued on said judgment.

Petitioner prays for all such other, further and general relief as is suited to the needs of her case, and in duty bound Petitioner will ever pray.

JEAN McNEIL PEPPER

WARREN & CANTWELL
A. K. MORISON,
"Counsel for Petitioner."

State of Virginia,
City of Bristol, to-wit:

I, Martha C. Smith, a Notary Public for the City of Bristol, and State of Virginia, hereby certify that Jean McNeil Pepper, whose name is signed to the foregoing petition, this day appeared in person before me in my City and State aforesaid and made oath that the facts stated in the foregoing petition as facts are true, and that those stated on information and belief she believes to be true.

My commission expires Aug. 9, 1936.

Given under my hand this the 11th day of October, [133] 1934.

MARTHA C. SMITH,
Notary Public.

This petition was filed by Jean McNeil Pepper, but no proof of claim in bankruptcy had been filed by her at the time of the filing of said petition. On the 19th day of October, 1934, which was, I believe two days after the Referee's letter, I wrote the Referee, Mr. Roberts, this letter:

(I. M. Q. NO. 4)

"October 19, 1934.

Hon. John Roberts, Referee in Bankruptcy,
Norton, Virginia.

Dear Sir:

In re: *Dixie Splint Coal Co., Inc., Bankrupt:*

I have your letter of October 17, 1934, enclosing copy of a petition filed before you by Jean McNeil Pepper, and copy of an order entered by you on October 17, 1934, pursuant to said petition.

I am inclosing herewith exception to the aforementioned order which I desire filed upon behalf of my client, Scott Litton. You will observe that this exception raises only the question that Mrs. Pepper is not entitled to the relief asked in her petition because she has filed no proof of claim in bankruptcy. It is my view that her petition

would not lie until proof of claim is filed, because in the absence of proof of claim she would not be entitled to share in the proceeds of the estate, or to benefit
[134] by the proceeding which she asked to be instituted, and that as a condition precedent to the granting of the relief prayed for in the petition she must file her proof of claim.

It is my understanding that in prosecuting these suits in the state court the procedure is that the Trustee in Bankruptcy is to be substituted as the plaintiff in the action. Since I represent the defendant Scott Litton, in these suits, I will, of course, not be able to act as counsel for the Trustee, and it seems to me that if these are to be litigated in the state court, it will be necessary for other counsel to be designated to represent the Trustee. As you know, I am now acting as counsel for the Trustee in certain other matters not connected with the above mentioned suit and unless it be deemed improper; I will continue to act in that capacity.

The order of the 17th directs the Trustee to intervene in both the chancery suit and the motion to quash the execution. I wish to call attention to the fact that in both proceedings the plaintiff seeks the same result upon identical grounds, and it appears to me that it is neither necessary nor proper to proceed in both cases and that one of them should be dismissed.

Yours very truly,

L. M. QUILLEN.

CC:
A. K. MORISON, Bristol, Va."

I offer in evidence the copy of letter which I have
[135] just read, to Mr. Roberts, and copy of the exception which I sent him at that time, which exception is as follows:

(I. M. Q. NO. 5)

"In the District Court of the United States for the Western District of Virginia:

In the Matter of
Dixie Splint Coal Company, Inc., Bankrupt.

Exception of Scott Litton to the order entered by

John Roberts, Referee, on the 17th day of October, 1934.

The undersigned Scott Litton, one of the creditors of the Bankrupt's estate, comes and excepts to the order entered in this matter by the Honorable John Roberts, Referee in Bankruptcy, on the 17th day of October, 1934, whereby the Trustee is directed to intervene in certain proceedings pending in the Circuit Court of Russell County, Virginia, and for ground of exception says:

That the petitioner, Jean McNeil Pepper, referred to in said order has filed no proof of claim in the bankruptcy proceeding alleging any debt due her by the Bankrupt, so as to entitle her to share in the Bankrupt's estate and that in the absence of such proof of claim she has no standing in the court of bankruptcy, and it is error under such circumstances to direct the prosecution of a suit on the part of the Trustee in which the said Jean McNeil Pepper is the plaintiff.

Respectfully submitted this _____ day of Oc-
[136] tober, 1934.

SCOTT LITTON
By Counsel.

_____"

On *Octobr* 25, 1934, I received this letter from the Referee, Mr. Roberts:

(I. M. Q. NO. 6).

"Norton, Virginia,
October 25, 1934.

Mr. I. M. Quillen, Atty.,
Lebanon, Virginia.

Dear Sir:

Re: Dixie Splint Coal Company, Bankrupt:

Your favor of October 19 inclosing exception to the order entered by me on the 17th day of October directing the trustee to intervene in a certain proceeding pending in the Circuit Court of Russell County received. I have filed the exception as of October 20. I do not feel that the exception is well taken. The schedules filed by the bankrupt show that Jean McNeil Pepper is a creditor

and under the law she has six months from the date of the bankruptcy to file her proof of claim. Should she prevail in the suit in the Circuit Court of Russell County it will be for the benefit of the general creditors and that seems to be the main purpose of the bankruptcy law, to protect general creditors. The trustee in bankruptcy has already heretofore been ordered to intervene in suits in which funds are involved that the trustee claims should be paid to the trustee in bankruptcy and I take it that all funds will be paid to the trustee, and in which
[137] event all creditors will of necessity have to file their claims in the bankruptcy case if they receive any benefit from any of the funds belonging to the bankrupt.

Then too, the proper place to test the question of whether or not Mr. Litton has a valid judgment is in the Circuit Court of Russell County in this proceeding. I note what you have to say with reference to your representing the Trustee. I take it that Mr. Morison will be willing to represent the trustee in this particular proceeding and should you find that the interest of your client is such that it will not be proper for you to represent the trustee it may be well for you to resign and allow the trustee to select some entirely disinterested attorney with the approval of the referee.

Yours very truly,

JOHN ROBERTS,
Referee in Bankruptcy."

JR/LB
CC: A. K. Morison,
Bristol, Va.

In reply to the letter which I have just read, I wrote Mr. Roberts, October 26, 1934, as follows:

(I. M. Q. NO. 7)

"October 26, 1934.

Hon. John Roberts,
Referee in Bankruptcy,
Norton, Virginia.

Dear Mr. Roberts:

In re: Dixie Splint Coal Company, Inc., Bankrupt:

I have your letter of October 25, 1934.

I, of course, agree with your view that the proper
[138] place to contest the validity of my client's judgment is in the Circuit Court of Russell County, Virginia, and it was not my purpose to contest that proposition. The ground of my exception was somewhat technical and the reasoning set out in your letter is, of course, perfectly accurate from a practical standpoint.

With reference to the matter of an attorney for the Trustee in various matters pending, I will say that I see no reason why Mr. Morison should not act as attorney for the Trustee in the matter of contesting the validity of Mr. Litton's judgment. As you know I have, as Attorney for the Trustee, intervened in three suits asking that funds held therein be paid to the Trustee. Since my client, Mr. Litton, agrees to the payment of these funds to the Trustee, there is, of course, no inconsistency in my prosecuting those matters to a conclusion. I have already succeeded, with the co-operation of counsel for Mrs. Pepper, in getting an order directing payment of the fund held by the Court in Norfolk and I believe that the other two matters will be concluded in a very short time. When these matters are concluded, there will be no more services to be performed for the Trustee that I know of except the prosecuting of the suit attacking the judgment, so unless there is serious objection, I will wind up the matters which I have undertaken as counsel for the Trustee. If, however, you think it best, it will be perfectly agreeable with me to resign now as counsel for the Trustee and let him select some attorney who has no connection with the case to represent him in all these matters, as suggested in the last paragraph of your letter.

Yours very truly,

I. M. QUILLEN.

Copy:

Mr. A. K. Morison, Bristol, Va."

In response to that letter I received the following letter from Mr. Roberts, dated October 27, 1934:

(I. M. Q. NO. 8)

"October 27, 1934.

"Mr. I. M. Quillen, Atty.,
Lebanon, Virginia.

Dear Sir:

Re: Dixie Splint Coal Co., Inc., Bankrupt.

"Your favor of October 26 received. I note what
[139] you have to say with reference to continuing as counsel for the trustee except in the matter involving Mr. Scott Litton's judgment in the Circuit Court of Russell County, Virginia. Under the circumstances as they appear in this case I see no objection to your continuing as counsel for the trustee, and I hope that Mr. Morison and his associates will be willing to represent the trustee's interest in that case and of course it is to the interest of the trustee and the general creditors to have the execution that has been issued on Mr. Litton's judgment quashed and the judgment declared void.

I notice that Mr. Litton has no objection to the funds involved in the other three matters all being paid into the hands of the trustee.

I hope that Mr. Morison and his associates will be willing to represent the trustee's interest should he need any representation in the proceeding that has been instituted in the Circuit Court of Russell County by Mrs. Pepper against Mr. Litton.

Yours very truly,

JOHN ROBERTS,
Rferee in Bankruptcy."

JR/LB
CC: A. K. Morison."

I offer each and all of these letters and papers referred to in evidence.

Your Honor, please, along about the same time this correspondence was being had, Mrs. Pepper, on her own initiative, instituted this motion to quash on her own be-
half, the record of which has already been intro-
[140] duced in evidence, and it was set, and I think heard on the 6th day of October. The Trustee had

not been directed to take any action at that time. At that time there was a plea as to jurisdiction. The Court heard that motion, and the Court expressed the opinion that it was not proper for him to hear it on account of the fact that bankruptcy was pending. Then, this correspondence was had, the last letter being on October 27, saying that Mr. Morrison had been asked to represent the Trustee. On the 29th of October, as I recall, the parties appeared here, the Trustee and myself, and Mr. Litton perhaps, in the Judge's room, where this matter was taken up. The Court inquired whether the Trustee was intervening, and the Trustee, as I recall, said that he had no counsel. At that time I read to the Court each of these letters between Mr. Roberts and myself. Mr. Warren was present on that day, and I told Mr. Warren and the Court that they would be expected to take the action. Mr. Warren said he would not represent the Trustee, because Mrs. Pepper claimed to be a lien creditor and not a common creditor. So, in view of that, I took the matter up further with Mr. Roberts, in person. I told him what had occurred, and pointed out to him that that was the reason for my exception. Mr. Roberts stated to me that if they still contended they were lien creditors, there would be no intervention. He stated to me at that time that the exception I had filed was not the proper way to test the question. I filed a motion to rehear that order. That came on to be heard on the 8th day of November, 1934.

By the Court:

Q. You mean it was heard in the Bankruptcy Court?

A. It was heard before the Referee in his office, [141] pursuant to notice. Not until the 8th day of November did Mrs. Pepper file her claim as a general creditor, and, according to the ruling of the referee, that was the first time that she was entitled to this intervention. I had, theretofore, resigned as counsel for the Trustee. These matters had been concluded and there was nothing more that I could do. At the time this agreed order was entered in this Court, I was not counsel for the Trustee, save and except in these other matters. I might say in addition that in one conversation I had with the Referee, before the entry of this agreed order in this interpleader proceeding, and while the matter of the intervention of Mrs. Pepper was under consideration, the

Referee urged me to proceed as fast I could to get all of these funds in the hands of the trustee.

Now, if Your Honor please, subsequent to the meeting at Mr. Roberts' office on November 8, I wrote Mr. Roberts this letter, dated Nov. 23rd:

(I. M. Q. NO. 9).

"November 23, 1734.

"Hon. John Roberts, Referee in Bankruptcy,
Norton, Virginia.
Dear Mr. Roberts:

In re: Dixie Splint Coal Co., Inc., Bankrupt:

It appears from the minutes of the meeting at your office on November 8th that your recollection and mine as to what statement was made at the first meeting of creditors regarding the chancery suit of Jean McNeil
[142] Pepper v. Scott Litton, et al in the Circuit Court of Russell County were not in accord.

I do not know whether this is a material matter or not, but regardless of its importance I should like to have the point clarified, because, under the circumstances prevailing at the time I felt that it was my duty as a lawyer to reveal all pertinent facts in regard to the condition of the bankrupt's estate. I thought the Referee should know that my client's judgment had been attacked, and I made these statements for that reason; therefore, in fairness to myself, especially in view of matters that have since transpired I feel like I should submit such further data as I can bearing upon this point.

You will recall that Mr. Claude S. Wilson, of our bar was present at the first meeting representing a creditor. I have *recenty* written to Mr. Wilson and asked him to state his recollection of my statement, which he has done. I am inclosing herewith copy of my letter to him and his reply. Mr. Litton and my father, who were present also recall the statement.

Yours very truly,

Enc.
IMQ:jh

I. M. QUILLEN"

I believe this was written subsequent to the letter written by Your Honor.

(I. M. Q. NO. 10).

"November 12, 1934.

"Mr. Claude S. Wilson,
Attorney at Law,
Lebanon, Virginia.

"Dear Sir:

In re: *Dixie Splint Coal Co. Inc., Bankrupt:*

I recall that as an attorney representing a creditor you were present at the first meeting of creditors of Dixie Splint Coal Company, Incorporated, bankrupt, at my office on the 26th day of September, 1934.

[143] A question has arisen as to what statement was made by me on that occasion to the Honorable John Roberts, Referee in Bankruptcy, with reference to a certain chancery suit pending in the Circuit Court of Russell County, Virginia, wherein Jean McNeil Pepper, Executrix, etc., is plaintiff and Scott Litton, et al, are defendants. In order to clear this matter up I would appreciate it, if you have any recollection of the matter, if you would write me what your recollection is as to the statement made by me in that regard.

Yours very truly,

I. M. QUILLEN."

IMQ:jh"

In reply to which I received this letter from Mr. Wilson:

(I. M. Q. NO. 11).

"Law Offices
WILSON, BURNS & WILSON
12-13-14 Burns Building
Lebanon, Va.

November 12, 1934.

Mr. I. M. Quillin, Attorney at Law,
Lebanon, Va.

Dear Sir:

In re: *Dixie Splint Coal Co. Inc. Bankrupt.*

In reply to your letter of November 12, 1934, I
[144] will say that I was present at the meeting of the creditors referred to in your letter and very clearly recall that you stated to Mr. Roberts, the Referee, at that time that there was a chancery suit pending in the Circuit Court of Russell County, Virginia, instituted by Mrs. Pepper against Scott Litton and others, wherein Mrs. Pepper was contesting the validity of Scott Litton's judgment. I further recall that Mr. Roberts replied that that was a matter which would have to be settled in the Circuit Court of Russell County.

Yours very truly,

CSW:e C. S. WILSON."

In reply to my letter to Mr. Roberts, enclosing the letters above referred to, I received letter from Mr. Roberts dated Nov. 24, 1934, as follows:

(I. M. Q. NO. 12)

"November 24, 1934.

"Mr. I. M. Quillen,
Lebanon, Virginia.

"Dear Sir.

Re: *Dixie Splint Coal Co., Bankrupt:*

Your letter of November 23 attaching the copy of your letter of November 12 to Mr. Claude S. Wilson and his reply thereto under date of November 12 received. I have filed these letters together with copy of this letter

in the papers. As I stated heretofore I remember that you made quite a detailed statement about the different
[145] suits that were pending that involved the Dixie Splint Coal Company, but you will remember that orders were entered with reference to only three of these suits and I take it that as you and Mr. Wilson say you did mention the chancery suit instituted in the Circuit Court of Russell County attacking the validity of Mr. Litton's judgment, but the statement did not seem to make much impression upon my mind at the time.

Yours very truly,

JOHN ROBERTS,
Referee in Bankruptcy."

JR&LB

Now, if Your Honor Please, as to what was done subsequent to the entry of this agreed order, as the Court has stated, there was some discussion between the court and myself, and I told the court that I was sorry that there was an apparent conflict in the entry of that order, that I had theretofore represented the Trustee in other matters, but did not represent him in that matter. I told the Court that all of this had been done with the knowledge of the Referee, counsel and all the parties. That I represented the interest of Mr. Litton. Now at Mr. Roberts' office on the 8th Messrs. Hamilton & Heuser were appointed counsel for the trustees and directed to report. Some time later they reported that an independent suit should be brought. That was long after the entry of this agreed order. That was the first and only final order entered by the referee directing an intervention, because the first order had been under review and in abeyance.
[146] When they reported their conclusions they recommended an independent suit, and the independent suit was brought. In fact, the Trustee was never directed to intervene until the authority given by Hamilton & Heuser. The first order was in abeyance during all that time.

With reference to the last order entered in the interpleader proceeding, your Honor told me to ask Mr. Smith to return the check, and gave his reasons. I 'phoned Mr. Smith and told him that His Honor asked that he return

the check. I believe his Honor misunderstood me, I believe you stated that on behalf of Mr. Litton I agreed for the order to be set aside.

The Court:

No, I did not make that statement. What the Court meant to state, and I think did state, was, when the possibilities of this situation appeared to me, I then had a conversation with you and indicated that I would enter an order directing the Trustee to return this check, and my recollection is that you suggested that you would have the Trustee return the check. Not that you were acting particularly on the part of anyone, that I remember, but, anyhow, you undertook to get the check back rather than have an order entered directing it to be brought back.

EXAMINATION OF I. M. QUILLEN

By Mr. M. M. Long:

Q. The last letters you read, I believe you did not introduce these in evidence?

A. I desire to introduce all the letters in evidence.

Q. These other letters you read in reference to
[147] your representation of the Trustee, please state whether or not copies of these letters were sent to A. K. Morison?

A. That is my recollection Mr. Long. The letters in regard to Mr. Wilson's knowledge of the bankruptcy meeting, copies were not sent to Mr. Morison. My recollection is that copies of all the other letters were sent to Mr. Morison.

Q. On October 29, when you met here in the Judge's office on the motion to quash the execution by Mrs. Pepper, and Mr. Smith stated at that time he was not represented by counsel, please state whether or not anything was done on that occasion?

A. Nothing was done at all.

Q. Was that the date that the correspondence was read between you and Mr. Roberts?

A. Yes, sir. I read each of these letters to the Court that day.

Q. You spoke about an order of the Referee being held in abeyance, which order do you have reference to, and what was it in regard to, Mr. Quillen?

A. I have reference to the order of the Referee under date of October 17, 1934, which I read to his Honor awhile ago, which the referee entered without notice, and which directed P. H. Smith, Trustee, to intervene in the chancery suit then pending in the Circuit Court of Russell County, to contest the validity of Mr. Litton's judgment and execution.

Q. Has the order of the Referee in which he directed the collection of this money by the Trustee, which was entered at the first meeting of the creditors, has that

[148] ever been set aside?

A. Not to my knowledge.

By Mr. Heuser:

We object. That is a matter of record.

Q. You have examined the records of the Referee and found no such order?

A. From the beginning the referee has sent me a copy of every order entered, and he has sent me no copy of such an order.

CROSS EXAMINATION.

By Mr. Heuser:

Q. On September 26, 1934, which was the date of the first meeting of creditors, and on which you were appointed as counsel for the trustee in bankruptcy, and on which date the trustee was directed to intervene in some matters then pending in other courts, you, of course, did not anticipate or realize that some time later it might be to the interest of the Bankrupt estate for the Trustee to contest the validity of the Scott Litton judgment?

A. No, sir, I did not. I knew, as I have stated, that Mrs. Pepper had this chancery suit, but she did not appear at the first meeting of creditors. The issues in the chancery suit had been made up for some time. I did not, of course, know what she meant to do. I assumed that she had abandoned it. I might possibly have had she appeared at the time and presented her claim. These labor liens were incurred, and there was no other way to pay them, and I represented some of the labor liens.

Q. So at that time you had not rendered an

[149] opinion as to the validity or invalidity of Scott Litton's judgment?

A. No, sir.

Q. And on November 1st you had resigned as attorney for the Trustee in so far as he was contesting the Scott Litton judgment?

A. That is right.

Q. And you did not sign that order?

A. The order of November 1st was entered pursuant to order of the Referee. Of course the Trustee in Bankruptcy did not sign it at all.

Witness stands aside.

The Witness CLAUDE S. WILSON, being first duly sworn, testified as follows:

By Mr. Long:

Q. Your name is Claude S. Wilson?

A. Yes, sir.

Q. I believe you are a practicing attorney-at-law?

A. Yes, sir.

Q. You are a member of the law firm of Wilson, Burns & Wilson?

A. Yes, sir.

Q. Who composes that firm?

A. B. T. Wilson, Clarence C. Burns and myself.

Q. Were you present at the first meeting of the creditors at the office of John Roberts?

A. No, sir. I was present at the meeting at Quillen & Quillen's office in Lebanon, Va.

[150] Q. How did you happen to be at that meeting held in the town of Lebanon?

A. As a member of the firm I have spoken of I was representing a claim of Appalachian Electric Power Company.

Q. Did you hear a statement made to the Referee there at that meeting by I. M. Quillen with reference to the pending of a chancery suit attacking the validity of the Scott Litton judgment?

A. I did.

Q. Just tell please what you heard said there by Mr. Quillen?

A. I heard Mr. Quillen say to Mr. Roberts that there was a suit pending in this Court by Mrs. Pepper against Scott Litton, the object of which was attacking the validity of Scott Litton's judgment against the coal company.

Q. Did Mr. Roberts make any reply, and if so what?

A. Yes, sir, his reply was that that was a matter that would have to be settled in this Court—or the Circuit Court of Russell County—

CROSS EXAMINATION.

Q. Was this matter generally discussed and considered there by the Referee?

A. I do not remember any legal points being discussed there concerning this suit. I believe they discussed some points concerning some money being held down about Norfolk.

Q. Were there any general claims filed in the Bankruptcy proceeding on that date?

A. Yes, sir. I filed one myself.

Q. For the Appalachian Electric Power Com-
[151] pany?

A. Yes, sir.

Q. How much was the Appalachian Electric Power Company General Claim?

A. I do not remember the amount.

Q. Wasn't it something in the neighborhood of $1,600.00?

A. I do not remember. I do remember that some time after that meeting I was instructed by a representative of the Appalachian Electric Power Company to withdraw that claim?

Q. They didn't tell you why?

A. No, sir.

RE EXAMINATION.

Q. Did you withdraw the claim of Appalachian Electric Power Company?

A. Yes, sir.

Q. At that meeting state whether or not you recall a discussion as to whether or not an order should be entered directing the Trustee to intervene?

A. I do not remember any discussion of that kind?

Witness stands aside.

The Witness S. B. QUILLEN, being first duly sworn, testified as follows:

Q. Your name is S. B. Quillen?
A. Yes, sir.
Q. Mr. Quillen, what is your occupation?
A. Lawyer.
Q. Where do you reside?
[152] A. Lebanon.
Q. How long have you resided at Lebanon?
A. About 40 years.
Q. How long have you been practicing law?
A. 40 years.
Q. What relation are you to I. M. Quillen.
A. I am his father.
Q. I will ask you whether or not you were present at the meeting held by Hon. John Roberts, Referee, in connection with the Dixie Splint Coal Company matters?
A. Yes, I was present at the meeting held in my office.
Q. I will ask you to state whether or not you heard any discussion there by I. M. Quillen with the Referee, with reference to the chancery suit which Jean McNeil Pepper had against Scott Litton?
A. Yes.
Q. What did you hear said there, Mr. Quillen, please?
A. Well, Mr. I. M. Quillen at that meeting stated to the Referee fully the status of all of the litigation that was then pending between Jean McNeil Pepper and Scott Litton, the litigation in different places over some funds which were being claimed by Mrs. Pepper and also Scott Litton, and also stated fully about the chancery suit pending here, and that the pleadings had been made up. I remember his statement that he did not know what the future purpose of Mrs. Pepper would be towards it.

Witness stands aside.

The Witness SCOTT LITTON, being first duly
[153] sworn testified as follows:

DIRECT EXAMINATION.

Q. Are you the same Scott Litton against whom chancery suit was filed by Jean McNeil Pepper, attacking the validity of your judgment against The Dixie Splint Coal Company?
A. I am.

Q. Were you present in Lebanon on the date of the first meeting of the creditors of the Dixie Splint Coal Corporation?

A. I was.

Q. Who else yas present there, if you recall please?

A. Claude Wilson, Mr. S. B. Quillen, Mr. I. M. Quillen, Mr. P. H. Smith and myself. I know they were there, I do not recall whether there was anyone else there or not.

Q. Was John Roberts there?

A. Yes, sir.

Q. Did you hear any discussion with the Referee by Mr. I. M. Quillen with reference to the pending of the chancery suit attacking the validity of your judgment against the Dixie Splint Coal Company?

A. I did.

Q. What did he say to the Referee?

A. Mr. Quillen went into rather a detailed statement as to the number of cases, particularly mentioning the case of Mrs. Pepper against Scott Litton, and that the chancery suit was then pending in the Russell County Court. He went on to say that he did not know what Mrs. Pepper's attitude would be towards the case, that there had not been anything done about it for some little time

[154] Mr. Roberts replied that this Court was the proper court in which to test the validity of that judgment.

Q. I believe I. M. Quillen had represented you as counsel?

A. He had.

Q. For how long?

A. Several years.

Q. Was it stated there at that meeting that I. M. Quillen represented you in this matter, in the proving of your claim and the matter of the chancery suit against you?

A. He filed the claim as my attorney.

CROSS EXAMINATION.

Q. There were not very many general claims filed at that meeting was there?

A. Very few.

Witness stands aside.

P. H. SMITH, being called as an adverse witness, subject to the rules of cross examination applicable to adverse witnesses testified as follows:

Q. Your name is P. H. Smith, I believe?

[155] A. Yes, sir.

Q. Where do you live Mr. Smith?

A. Clinchfield, Virginia.

Q. Are you the plaintiff in this action?

A. Yes, sir.

Q. Are you the same P. H. Smith who was Secretary & Treasurer of the Dixie Splint Coal Company?

A. Yes, sir.

Q. First, I want to ask you this, did you at the time of your intervention in the interpleader proceeding, which has been mentioned here, did you know that Mrs. Jean McNeil Pepper had pending in this Court a suit in chancery contesting the validity of Scott Litton's judgment?

A. I did.

Q. Mr. Smith, as Secretary & Treasurer of the Dixie Splint Coal Company, did you attend the stockholders meetings of the company?

A. Yes, sir.

Q. Did you attend a meeting of the stockholders of the Dixie Splint Coal Company, on the 15th day of December, 1933, annual meeting?

A. Yes, sir.

Q. As secretary & Treasurer, did you keep the minutes of that meeting?

A. Yes, sir.

Q. Do you have the Minutes of the stockholders meeting held on that date, if one was held?

A. Yes, they are in the Minute Book.

Q. I hand you what purports to be the Minute

[156] Book of the Dixie Splint Coal Company, and will ask you to read the Minutes of the meeting found on page 141?

Mr. Hamilton:

We object to that because totally irrelevant and immaterial to any issues in this case as to what The Dixie Splint Coal Company did. As I understand the issue made in this case is whether or not the Trustee is estopped.

Mr. Quillen:

The question as to the validity of this judgment has not been definitely ruled on. This is to show upon what authority this judgment was confessed, and its ratification by the Stockholders of the Dixie Splint Coal Company.

Mr. Heuser:

You have never alleged ratification.

Mr. Quillen:

The amended plea alleges that.

The Court:

As I understand, what you are offering this for is for the purpose of showing that the judgment which had theretofore been entered was approved and confirmed by the stockholders of the Dixie Splint Coal Company?

Mr. Quillin:

Yes, sir.

By Court:

Objection overruled.

By Mr. Hamilton:

Exception.

[157] (EXHIBIT Page 141 Minute Book).

"H5313b. "141."

"At the annual meeting of the stockholders of the Dixie Splint Coal Company, Incorporated, held at its principal office at Clinchfield, Virginia, on December 15th, 1933.

The meeting was called to order by Scott Litton, acting as Chairman, and P. H. Smith, acting as Secretary. On roll call it was found that all stockholders, representing the entire outstand stock of the company, were present. Minutes of the previous meeting was read and also the minutes recorded of the Directors meetings were read and approved. Waiver of notice was accepted by all stockholders.

Scott Litton, President of the company made a report as to the future prospects of the company, stating

therein that he agreed to accept a salary reducton of $2,000.00 a year, and stated that should the company secure sufficient business to justify the raising of this salary that he would expect it to be raised at some future date.

The question of indebtedness to Scott Litton was discussed and he informed the stockholders that he felt like he should not be asked to carry this indebtedness indefinitely, and indicated his desire to have some action taken on the question of payments on the judgment which the corporation had confessed in his favor in June, 1933, which action of the Directors is hereby ratified and confirmed by the stockholders. A lengthy discussion of future prospects of the company was gone into by all stockholders, and it was decided to try further operations, with the view of gaining back some of the losses of the company over the past two or three years.

The next in order was the election of directors, and upon motion duly made and seconded, the previous directors were re-elected to serve for a period of
[158] twelve months, namely: Scott Litton, P. H. Smith, and Pauline Jones Litton.

There being no further business before the meeting, and upon motion the meeting adjourned.

SCOTT LITTON,
Chairman.

P. H. SMITH,
Secretary."

Q. Mr. Smith, at the time of your intervention
[159] in the interpleading proceeding, did you know that the money which the Clerk had was the proceeds of the sale under Scott Litton's execution?

A. Yes, sir.

Q. Is it not a fact, Mr. Smith, that your intervention in this suit is at the sole instance and request of Jean McNeil Pepper, Executrix?

A. Yes, sir.

Q. Is it not a fact, Mr. Smith, that Jean McNeil Pepper and Scott Litton are the only general creditors of Dixie Splint Coal Company?

A. Yes, sir, so far as I know.

Q. Does the Dixie Splint Coal Company owe anybody else?

A. Not to my knowledge.

Q. I believe you kept the books of the Dixie Splint Coal Co.

A. Yes, sir.

Q. Were you familiar with the accounts receivable and accounts payable to the corporation and are you now?

A. Yes, sir.

Q. Do you know of any other creditor of the estate who desires Scott Litton's judgment set aside?

A. I do not.

Q. Do you know when Mrs. Pepper filed her proof of claim in the Bankruptcy Court?

A. Yes, it was on Nov. 8, 1934.

Q. Whereabouts?

A. In Norton, Virginia.

Q. At whose office?

[160] A. Referee's office.

Q. Was that at a meeting of the creditors held on that date at that place to determine the question of what action should be taken?

A. I believe it was. I have a copy of the order there stating just what the purpose was.

Q. As Secretary & Treasurer of the Dixie Splint Coal Company what were your duties?

A. Well, the regular duties of the Secretary & Treasurer, and also I looked after the management.

Q. Who generally looked after the financial affairs of the Company?

A. I did.

Q. Who was President of the Company?

A. Scott Litton.

Q. What were his duties?

Mr. Hamilton:

We object to that and all similar *question*.

Objection sustained.

Exception.

Mr. Quillen:

We desire the witness to answer for the record.

A. He principally looked after the sales end of it.

EXAMINATION.

By Mr. Heuser:

Q. Mr. Smith, do you know of your own knowledge who filed claims in this bankruptcy case?

A. I can get it from the record.

Q. Do you know whether there are any creditors other than Jean McNeil Pepper?

[161]

A. You mean originally?

Q. Yes.

A. Yes, sir.

Q. Who?

A. Appalachian Electric Power Company, Southern Railway Co., Commercial Acetylene Supply Co.

Q. Is the claim of Appalachian Electric Power Company still standing?

A. The claim was withdrawn, according to my understanding.

Q. Who withdrew the claim?

By Mr. Quillen:

We object.

Overruled.

A. The Appalachian Electric Power Company.

Why did they withdraw the claim?

By Mr. Quillen:

We object to that.

The Court sustains the objection, but you may answer for the record.

By Mr. Heuser:

Exception.

A. My understanding is that Mr. Litton purchased these claims.

Q. Is your answer also applicable to the claim of Southern Railroad Company and Commercial Acetylene Supply Company?

A. Yes, sir.

Q. Who directed you to institute this proceeding against Scott Litton?

By Mr. Quillen:

We object.

Overruled.

Exception.

Q. Mr. Smith, do you know anything about the
[162] doctrine of estoppel, or the election of remedies. Were you advised as to either of these by your counsel at the time you filed your petition in the interpleader proceedings?

By Mr. Quillen:

We object to that because the evidence shows that there was no occasion for him to seek or ask anything of the kind.

Overruled.

Exception.

A. The Referee in Bankruptcy directed me to employ counsel to handle these matters.

Q. Whom did you employ?

A. I. M. Quillen & S. B. Quillen.

Q. Did either of your counsel advise you as to what you might expect as a waiver of rights under the doctrine of estoppel?

By Mr. Quillen:

Same objection.

Overruled.

Exception.

A. No.

RE-EXAMINATION.

By I. M. Quillen:

Q. Mr. Smith, who are your counsel in this proceeding?

A. Messrs. Hamilton & Heuser.

Q. Do you have any other counsel?

A. Not to my knowledge.

Q. Is anyone assisting your counsel today in this proceeding?

A. I am unable to answer that.

Q. Have Mr. Graham Morrison and Mr. Wood-
[163] ward been sitting at the table with your counsel and making suggestions.

Mr. Heuser:

That is rather irrelevant.

The Court:

I think he may ask.

A. They have, yes, sir.

Q. Mr. Graham Morison has been counsel for Jean McNeil Pepper?

A. That is my understanding.

Q. Mr. Smith, you stated in your examination that certain general claims were filed in the first meeting of creditors?

A. Yes, sir.

Q. Have they since been withdrawn, all of them?

A. Yes, sir.

RE EXAMINATION.

By Mr. Heuser:

Q. Mr. Smith, do you know of your own knowledge, or by the records in this Bankruptcy proceeding that all general claims have been withdrawn?

A. All that I know anything about.

Q. Do you state to the Court that there are no other general creditors in this Bankruptcy?

A. As far as I know. There are no others to my knowledge.

Witness stands aside.

The Witness, M. C. CHAFIN, being first duly [164] sworn, testified as follows:

DIRECT EXAMINATION.

By I. M. Quillen:

Q. Mr. Chafin, I believe you are a Deputy Sheriff of this County?

A. Yes, sir.

Q. Who is your principal?

A. N. F. Castle.

Q. I hand you a paper which has been introduced in evidence and identified as an execution of a judgment in favor of Scott Litton v. Dixie Splint Coal Company, and ask you whether or not that execution came to your hand as Deputy Sheriff?

A. It did.

Q. I will ask you whether or not you made the returns which are shown upon the execution?

A. Yes, sir.

Witness stands aside.

The Witness, SCOTT LITTON, Recalled:

By M. M. Long:

Q. One question I overlooked asking you, that is whether or not you were present on the day Mr. Warren and others were here, I believe about the 29th of October, at the hearing to quash the execution?

A. Yes, I was present.

Q. Did you hear the letters which Ira Quillen has offered in evidence, read, letters between Mr. Quillen and Mr. Roberts?

A. I remember there were letters read in there
[165] pertaining to the Trustee in Bankruptcy employing counsel, saying that he supposed that Mr. Morison would possibly act as counsel.

Q. Did you hear I. M. Quillen say he could not represent the Trustee?

A. I did.

Q. Did Mr. Warren at that time say anything about whether he could represent the Trustee, or not?

A. He said he could not.

Q. Who was he representing?

A. Mrs. Jean McNeil Pepper.

By I. M. Quillen:

Q. I believe you are the defendant in this case?

A. I am.

Q. I believe you were the President of the Dixie Splint Coal Company?

A. Yes, sir.

Q. Did the officers and Directors of the company know that the sale under your execution was being made?

A. They did.

Mr. Heuser:

We object to Mr. Litton stating what the other officers and stockholders knew.

Mr. Quillen:
He could know it, and he does know it.

Q. All right, Mr. Litton, did Mr. Smith and my-
[166] self and the other officers of the Dixie Splint Coal Company ever discuss the question of your judgment, what was going to be done about it?

A. I had carried this indebtedness for several years against the Corporation—

Q. I don't believe you understood the question (question read.)

A. We did.

Q. Did you know, and did the other officers know, what was being done?

A. We did.

Q. Did the Company, through any of its officers, ever in any wise object to that sale?

A. They did not.

Q. Did you ever discuss with P. H. Smith, the Secretary and Treasurer of the Company, the matter of payment of a portion of the proceeds to the Clinchfield?

A. I did.

Q. Did you, or Mr. Smith, ever make any objection to that?

A. I did not.

Q. Do you know of Mr. Smith ever doing so?

A. Not to my knowledge.

CROSS EXAMINATION.

By Mr. Heuser:

Q. Mr. Litton, what was the outstanding capital stock of the Dixie Splint Coal Company at the time of the filing of this petition in Bankruptcy?

By Mr. Quillen:
Objected to because irrelevant and immaterial.
Overruled.
Exception.

A. 500 shares of $100.00 par value each.

[166A] Q. How many shares of that stock did you own, Mr. Litton?

We object because irrelevant and immaterial, not responsive to the examination in chief.
Overruled.
Exception.

A. 162½ shares. I would have to look at the records to verify that.
Q. How many shares of stock did Mr. Smith own?

By Mr. Quillen:
We object because irrelevant and immaterial, not responsive to the examination in chief.
Overruled.
Exception.
A. According to this record, and I think this record is correct, Mr. Smith owned 52½ shares, and I owned 125 shares.
Q. Is your wife a stock-holder?

Mr. Quillen:
I object.
Overruled.

A. Yes, sir.
Q. How many shares did she own?
A. 62½ shares.
Q. Any other stockholders?

By Mr. Quillen:
Objected to because irrelevant and immaterial.
Overruled.
Exception.

A. Yes, sir.
Q. Who are the others?

By Mr. Quillen:
Objected to because irrelevant and immaterial.
Overruled.
[167] Exception.

A. J. W. Jones, A. C. Jones and C. P. Jones.
Q. How many shares does Mr. J. W. Jones own?

By M. Quillen:

We object because irrelevant and immaterial, not responsive to the examination in chief.

Overruled.

Exception.

A. 72½ shares, C. P. Jones 61½ shares and A. C. Jones, 62½ shares.

Q. Are J. W. Jones, A. C. Jones, or C. P. Jones either related to you?

By Mr. Quillen:

We object because irrelevant and immaterial, not responsive to the examination in chief.

Overruled.

Exception.

A. C. P. Jones is my father-in-law, A. C. Jones and J. W. Jones are my brothers-in-law.

RE-EXAMINATION.

By I. M. Quillen:

Q. Are you acquainted with the bills payable to the Dixie Splint Coal Company, who they owed?

A. Yes, sir.

Q. Do they owe any other general creditors, except yourself and Mrs. Jean McNeil Pepper?

A. Not to my knowledge I am thoroughly acquainted with the indebtedness of the Company, and there is no other just and honest claim which should be presented.

Q. And you do not know of any other unjust ones?

A. You never can tell about those.

[168] Q. Do you know whether there is any other creditors of the estate who wants this judgment set aside, besides Jean McNeil Pepper?

A. There is no other.

RE-CROSS EXAMINATION.

Q. Do you know, Mr. Litton that Price Bros., have a claim against the Dixie Splint Coal Company?

A. Price Bros., is a preferred claim, and it is not objected to by me as a creditor.

Q. Do you know that they have filed their proof of claim?

A. I know that they have, yes.

Q. Do you know it was put in as a preferred claim, and is a preferred claim?

A. Yes.

Q. Can you state of your own knowledge that the Referee in Bankruptcy has so ordered?

A. The Price Bros. claim consists of an assignment of wages, and the Dixit Splint Coal Company only held in trust the money earned, and Dixie Splint Coal Company never considered that it was their money in the first place.

Q. I do not believe you understand my question. I asked you if you knew whether the proof of claim filed by Price Bros., had been ordered treated as a preferred claim?

A. I don't think the Price Bros. claim has been settled.

Q. Has Mrs. Pepper's claim ever been allowed?

A. I do not know what claims the Referee has allowed.

Q. Did you file an exception to the allowance of [169] Mrs. Pepper's claim?

By Mr. Quillen:

We object.

A. As a general claim, yes.

Q. Mr. Litton, do you mean to state that there are no other general claims filed in the Bankruptcy proceeding; other than your own and Mrs. Pepper's?

A. I do. I am prepared to say that I own all claims that have been filed in the Bankrupt court, other than that of Mrs. Pepper.

Q. Are you positive of that fact?

A. I am positive of that fact.

Q. Why did you buy all the general claims except Mrs. Peppers?

Mr. Quillen:

Objected to.

By the Court:

Sustained.

Mr. Heuser:
Exception.

Witness stands aside.

The Witness S. B. QUILLEN, Recalled:

By Mr. Long:

Q. Mr. Quillen, were you present here on October 29th, when Mr. Warren was here, and the question of quashing the execution of Scott Litton was up before the Court?

A. Yes, I was present.

Q. Did you hear I. M. Quillen on that occasion read copies of letters that he had written to Mr. Roberts, the Referee in Bankruptcy, and Mr. Roberts' reply with reference to employment of counsel for the Trustee?

A. I heard the letters read.

Q. Please state what, if anything, Mr. Warren said on that occasion?

A. Mr. Warren said that counsel for Mrs. Pepper was not in position to represent the Trustee, because they claimed a preferred lien. The Trustee said he
[170] had no counsel, and the matter ended right there, then the whole correspondence was read.

RE-CROSS EXAMINATION.

By Mr. Heuser:

Q. What date was that Mr. Quillen?

A. I think it was the 29th of October. It was before the agreed order was entered, and these other transactions.

Q. Were you present on Nov. 1st, when that order was entered?

A. No, I was not.

Witness stands aside.

Mr. Heuser:

At this point we move to strike out all of the evidence offered because irrelevant and immaterial to any issue in the cause, and also renew our motion to strike out the pleas.

The Court:

The motions will be overruled.

Exception.

Adjourned Until 10:00 A. M. February 22nd:

AGREEMENT: It is agreed by counsel representing the parties that all writen instruments and documentary evidence which has heretofore been introduced in evidence, but not read, may be treated and regarded as having been read to the Court.

MET pursuant to adjournment on this the 22nd [171] day of February, 1935.

I. M. QUILLEN, Recalled:

By Mr. Long:

Q. Mr. Quillen, on yesterday you spoke about a certain suit pending at Norfolk and another one at Bristol in which Dixie Splint Coal Corporation was interested, and in which certain proceedings were had by Scott Litton, I will ask you to please tell what the nature of these suits was, and what orders were entered therein?

A. Morris S. Hawkins and L. H. Winzhold, Receivers for Norfolk-Southern Railway Co., were indebted to the Dixie Splint Coal Company in an amount of probably $7,400.00 to $7,500.00 against a part of which they claimed a set off. Mrs. Jean McNeil Pepper and Scott Litton both garnisheed the Receivers, and as I am advised the papers were both served at the same time. The Receiver took the position that being a Receiver under a Federal Court, he could not be garnisheed. Then, the Receiver, I believe, filed a petition stating these facts in the Federal Court, and made Jean McNeil Pepper and Scott Litton defendants, and set out all of the facts and required these parties to answer them, and I think they did answer, and both Scott Litton and Mrs. Pepper dismissed the garnishee which they had instituted, and proceeded to submit their rights as they claimed them to this Court. That was in a case under the style of Central Hanover Bank & Trust Company v. Norfolk Southern Railway Company. That proceeding was then referred to a Master to determine certain questions. I was then directed by order

entered by the Referee on the 26th day of Sep-
[172] tember, 1934, as counsel for the Trustee, to intervene in that proceeding and get that money in the hands of the Trustee, if I could, and I have a certified copy of that order which I desire to offer in evidence, have copy of the petition filed in the United States District Court for the Eastern District of Virginia, by P. H. Smith, Trustee, and also have certified copy of the order of the Referee directing that proceeding, which I will file as soon as I can find it in my file; I have now a copy of the agreed order which was entered in that case.

Petition of P. H. Smith, is as follows:

(I. M. Q. NO. 13)

"In the District Court of the United States for the Eastern District of Virginia:

CONSOLIDATED CAUSE IN EQUITY NO. 278.

Central Hanover Bank & Trust Company,
as Trustee, et al,
v. Petition of P. H. Smith, Trustee.
Norfolk Southern Railroad Company, et al.

To the Honorable Judge of said Court:

Your petitioner, P. H. Smith, would respectfully show:

That pursuant to its petition filed in the United States District Court for the Western District of Virginia on the 4th day of September, 1934, Dixie Splint Coal Company was on the 7th day of September, 1934, duly adjudged a bankrupt, copy of which said order of adjudication is filed herewith as part of this petition, marked "Exhibit Adjudication".

That on the 26th day of September, 1934, your
[173] petitioner was duly elected Trustee of said Bankrupt's Estate, and has duly qualified as such Trustee, as provided by law;

That there is now pending in your Honor's Court a certain suit in equity under the name of Central Hanover Bank & Trust Company, as Trustee, et al v. Norfolk

Southern Railroad Company, being consolidated Cause in equity No. 278, wherein conflicting claims are being asserted by Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right, on the one part, and Scott Litton, on the other part, to a certain sum of $7562.08, owing by Morris S. Hawkins and L. H. Windholz, Receivers for Norfolk Southern Railroad Company, to Dixie Splint Coal Company, Incorporated, and in which said suit a claim of set off was asserted by the said Receivers against the said Dixie Splint Coal Company, Inc. Your petitioner is advised, however, that there is no issue in said suit between Dixie Splint Coal Company, Incorporated, and the said Receivers, and that long prior to the filing of their petition the said Dixie Splint Coal Company, Incorporated, credited the account of the said Receivers by the amount of the set off claimed by them, leaving the net balance of $7562.08 still due.

That by order entered on the 26th day of September, 1934, by John Roberts, Referee in Bankruptcy, your petitioner, as Trustee of the Bankrupt's Estate, was authorized to intervene in this proceeding, copy of which said order is filed herewith as a part of this petition, marked "Exhibit Order."

That your petitioner is advised and avers that the supposed lien being asserted by Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, De-
[174] ceased, and in her own right, in this proceeding, accrued within 4 months of the filing of said Bankrupt's petition and adjudication as a Bankrupt, and is rendered void by said adjudication.

Your petitioner is further advised and avers that the action in which the alleged judgment of the said Jean McNeil Pepper, Executrix, etc., was rendered in the Corporation Court of the City of Bristol, Virginia, is now pending and undetermined in the Supreme Court of Appeals of Virginia, and by reason of which your petitioner contends that any supposed lien created by execution issued on said judgment is rendered void.

Your petitioner is not advised as to the validity of the supposed lien being asserted in this proceeding by Scott Litton, but is advised that the said Scott Litton has no objection to the fund now owing by the said Receivers to Dixie Splint Coal Company, Incorporated, being paid to your petitioner and administered in Bankruptcy.

Your petitioner avers that certain preferred labor claims have been filed in said Bankruptcy proceeding, which are entitled to be paid out of the fund above mentioned, and that the ends of justice and proper administering of said estate in bankruptcy demand that the fund now owing by the said Receivers to Dixie Splint Coal Company, Incorporated, be paid to your petitioner and administered in a Court of Bankruptcy.

Your petitioner prays, therefore, that he be permitted to file this his petition in this suit, and that Jean McNeil Pepper, Executrix of the Estate of A. P.
[175] Pepper, deceased, and in her own right, Scott Litton and Morris S. Hawkins and L. H. Windholz, Receivers, be made parties defendant to this proceeding, and be required to answer the same, and that the said sum now owing by the said Receivers to Dixie Coal Company, Incorporated, be ordered paid to your petitioner.

And he will ever pray, etc.

P. H. SMITH,
Trustee for Dixie Splint Coal Co., Inc.

By counsel.

State of Virginia,
County of Russell, to-wit: .....

This day personally appeared before me ....., a Notary Public in and for the County and State aforesaid, P. H. Smith, who being first duly sworn, says, that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge *said* belief.

My commission expires on the .. day of ....., 19..

Given under my hand this the .... day of ....., 1934.

Notary Public."

The agreed order is as follows:

(I. M. Q. NO. 14).

"In the Western District Court of the United States for the Eastern District of Virginia:

CONSOLIDATED CAUSE IN EQUITY NO. 278.

Central Hanover Bank & Trust
Company, as Trustee, et al
vs. () ORDER.
Norfolk Southern Railroad Co., et al.

And in the constituent cause Nos. 268, 278, 290,
[176] and 292 of said Consolidated Cause.

This cause came on this day to be heard upon the papers formerly read therein, former orders and decrees, and particularly upon the petition of Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right as sole devisee of said A. P. Pepper, filed pursuant to the order entered in this cause on the 10th day of July, 1934; the respective answers of Scott Litton and Dixie Splint Coal Company, Incorporated, to said petition; the answer and cross bill of Morris S. Hawkins and L. H. Windholz, Receivers of Norfolk Southern Railroad Company, filed pursuant to the order entered herein on the 25th day of July, 1934, and the respective answers of Scott Litton and Dixie Splint Coal Company, Incorporated, to said cross-bill; upon the petition of P. H. Smith, Trustee for Dixie Splint Coal Company, Incorporated, bankrupt, this day filed by leave of Court, to which said petition the defendants named therein, to-wit: Jean McNeil Pepper, Executrix and in her own right, Scott Litton, Morris S. Hawkins and L. H. Windholz, Receivers, by counsel, this day appeared generally, and was argued by counsel.

Upon consideration whereof, it appearing to the Court that by an order entered in this cause on the 25th day of July, 1934, this cause was referred to George Pilcher, Esquire, who was thereby appointed Special Master, and directed to make inquiry and report to the Court his findings upon the following issues:

(1) As to the amount due by Receivers of Norfolk Southern Railroad Company to Dixie Splint Coal Company, Inc.

(2) The right of Receivers to set off thereto for
[177] the express cost of coal purchased by them for their requirements for the period June 15 to July

1, 1934, over the price agreed to be paid for coal to be furnished under said contract with Dixie Splint Coal Company, Incorporated.

(3) The right of the said Scott Litton and Jean McNeil Pepper, in her own right, and as Executrix of A. P. Pepper, deceased, to issue garnishments against the Receivers of Norfolk Southern Railroad Company for amounts due by said Receivers to the Dixie Splint Coal Company, Incorporated;

(4) The right, if any, the said Scott Litton and the said Jean McNeil Pepper, in her own right; and as Executrix of A. P. Pepper, deceased, may have as to the alleged garnishments issued, as in the answer and cross bill of said Receivers set forth, fulfilling the office of a notice of execution;

(5) The party liable for the cost of the reference and hearing by the said Special Master.

That subsequent to the said reference and before any hearings were held by the said Special Master, the Dixie Splint Coal Company, Inc., was adjudged bankrupt in the United States District Court for the Western District of Virginia, and P. H. Smith qualified as Trustee of the bankrupt's estate and has by his petition this day filed by leave of court asked that the amount due and owing by Morris S. Hawkins and L. H. Windholz, Receivers, be paid to said Trustee to be administered in bankruptcy;

And it further appearing to the court that all of the parties at interest in this matter have agreed that the set off claim by the Receivers against the Dixie Splint Coal Company, Inc., in this action is proper and should be allowed, and that after allowance of the amount of said set off claim, in the sum of $1470.95, there remains owing to the said Dixie Splint Coal Company, Inc., or its Trustee in Bankruptcy, the sum of $7562.08.

[178] And it further appearing to the Court from the pleadings filed in the cause that the garnishment proceedings mentioned in the aforesaid reference by Jean McNeil Pepper, etc., and Scott Litton have been dismissed;

And it further appearing to the Court that all parties

in interest in this matter have agreed that the costs mentioned in paragraph 5 of the aforementioned reference incident to the hearing before the said Special Master may be paid out of the aforementioned fund due the bankrupt;

And it further appearing to the Court that there has been as yet no hearing before the Special Master and that by virtue of the pleadings filed since said reference and the agreement of the parties above recited, there remains no issue to be reported by the said Special Master pursuant to said reference.

Therefore, with the consent and agreement of the aforementioned Jean McNeil Pepper, Executrix and in her own right, Scott Litton, Morris S. Hawkins and L. H. Windholz, Receivers, and P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Inc., it is adjudged, ordered and decreed that the said Special Master, George Pilcher, Esquire, be relieved of all further duties and obligations under the aforementioned decree of reference and that after deduction of all costs properly chargeable on account of the said reference to the said Special Master, the remainder of said fund of $7562.08, be paid forthwith to P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Incorporated, Bankrupt.

We, the undersigned parties in interest, hereby agree to all of the terms and provisions of the foregoing order.

.....
.....
.....
[179] .....”

In regard to this order I wish to say that this is a carbon copy of the order, which has not been completed to show the names of counsel who signed it. This order, the original, was signed by George M. Warren, as counsel for Jean McNeil Pepper, by I. M. Quillen, as counsel for Scott Litton, and I think by I. M. Quillen as counsel for P. H. Smith, Trustee. I cannot be positive of that, and by Col. Rodney, General counsel for Hawkins & Windholz, Receivers of Southern Railway Co.

Q. How long before the entry of the order was it agreed to by these parties?

A. About 4 days.

Q. Were those funds paid pursuant to that order to the Trustee in Bankruptcy?

A. They were, and part of them have been disbursed.

Q. I will ask you to speak with reference to the proceeding at Bristol?

A. Dixie Splint Coal Company had on deposit in The Dominion National Bank, *somthing* in excess of $800.00, nearly $900.00. That also was garnisheed by Mrs. Pepper, and in that garnishee proceeding Mr. Litton appeared and set up a claim of prior lien, and it was pending in the Court at Bristol at the time of the adjudication in Bankruptcy, as was the matter pending in Court at Norfolk. In that matter the Referee entered an order on the 26th and directed me to intervene in that suit and get that money in the hands of the Trustee, if I could.

Q. Did you file a petition in that proceeding?

[180] A. I did, and herewith file a copy of that petition. tition.

(I. M. Q. NO. 15)

PETITION OF P. H. SMITH Trustee.

"Virginia:

In the Corporation Court of the City of Bristol.

Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right, Plaintiff,

vs.

Dixie Splint Coal Company, Inc., and Dominion National Bank, Defendants.

To the Honorable Floyd Roberts, Judge:

Your petitioner, P. H. Smith, would respectfully show:

That pursuant to its petition filed in the United States District Court for the Western District of Virginia, on the 4th day of September, 1934, Dixie Splint Coal Company was on the 7th day of September, 1934, duly adjudged a bankrupt, copy of which said order of adjudication is filed herewith as part of this petition, marked "Exhibit Adjudication".

That on the 26th day of September, 1934, your petitioner was duly elected Trustee of said Bankrupt's Estate, and has duly qualified as such Trustee, as provided by law.

That there is now pending in Your Honor's Court a certain proceeding in garnishment, in the name of Jean McNeil Pepper, Executrix of the estate of A. P. Pepper, deceased, and in her own right, plaintiff v. Dixie Splint Coal Company and Dominion National Bank, defendants, whereby the said plaintiff asserts a lien against the sum of $868.37 on deposit in Dominion National Bank of Bristol, Va., to the credit of Dixie Splint Coal Co.,
[181] Inc., and in which said proceeding a lien is also claimed against said deposit by Scott Litton.

That by order entered on the 26th day of September, 1934, by John Roberts, Referee in Bankruptcy, your petitioner, as Trustee of the Bankrupt's Estate, was authorized to intervene in this proceeding, copy of which said order is filed herewith as a part of this petition, marked "Exhibit Order".

That your petitioner is advised and avers that the supposed lien being asserted by Jean McNeil Pepper, Executrix of the Estate of A. P. Pepper, deceased, and in her own right, in this proceeding, accrued within 4 months of the filing of said Bankrupt's petition, and adjudication as a bankrupt, and is rendered void by said adjudication.

Your petitioner is not advised as to the validity of the supposed lien being asserted in this proceeding by Scott Litton, but is advised that the said Scott Litton has no objection to the fund now on deposit in the Dominion National Bank of Bristol, Virginia, being paid to your petitioner and administered in Bankruptcy.

Your petitioner avers that certain preferred labor claims have been filed in said bankruptcy proceeding, which are entitled to be paid out of the fund above mentioned, and that the ends of justice and proper administering of said estate in bankruptcy demand that the fund now on deposit in the Dominion National Bank of Bristol, Virginia, be paid to your petitioner and administered in a Court of Bankruptcy.

Your petitioner prays, therefore, that he be permitted to file this his petition in this suit, and that Jean

McNeil Pepper, Executrix of the Estate of A. P.
[182] Pepper, deceased, and in her own right, Dominion National Bank and Scott Litton, be made parties defendant to this petition, and be required to answer the same answer under oath, however, being hereby waived, and that the said fund now on deposit in the Dominion National Bank of Bristol, Virginia, to the credit of Dixie Splint Coal Company, be ordered paid to your petitioner.

And he will ever pray, etc.

P. H. SMITH,
Trustee for Dixie Splint Coal Co. Inc.

By Counsel.

Order was entered permitting the filing of this petition, as follows:

(IMQ NO. 15A)

"Virginia:

Corporation Court of the City of Bristol, on Wednesday the 3rd day of October, in the year of our Lord, Nineteen Hundred and Thirty-four.

Present:

The Hon. Floyd H. Roberts, Judge.

Jean McNeal Pepper, Executrix of the Estate
of A. P. Pepper, Deceased and in her own right Plaintiff
v. () ORDER
Dixie Splint Coal Company, and
Dominion National Bank Defendants.

Upon motion of P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Incorporated, Bankrupt, the said P. H. Smith, Trustee, is hereby permitted to file
his petition in this suit, and the Clerk of this
[183] Court is hereby directed to issue process against the defendants named therein, Jean McNeil Pepper, Executrix and in her own right Dominion National Bank and Scott Litton, requiring them, and each of them,

to appear and answer the said petition on or before the 15th day of October, 1934.

Service of copy of this order shall be deemed sufficient service of process to answer the above named petition.

A Copy Teste:

DAN DRINKARD,
Clerk."

Q. Will you produce and file a copy of the order which was entered in that case directing payment of the funds to the Trustee in Bankruptcy?

A. Yes, if I can find it.

(Which copy was later filed as "Exhibit IMQ No. 16", and is as follows:)

"Virginia:

In the Corporation Court of Bristol:

Jean McNeil Pepper, Executrix of A. P. Pepper, Deceased, and in her own right as sole Devisee of A. P. Pepper — Plaintiff

v. ORDER

Dixie Splint Coal Company, Incorporated, and Dominion National Bank, — Defendants.

Pursuant to an agreement of all parties in interest, it is ordered that the defendant, Dominion National Bank, pay to P. H. Smith, Trustee in Bankruptcy for Dixie Splint Coal Company, Incorporated, Bankrupt,
[184] the sum of $868.37, being the amount on deposit in said bank to the credit of Dixie Splint Coal Company, Incorporated, after deducting the cost of this proceeding, which said cost the said bank shall pay to the Clerk of this court.

Agreed to
George M. Warren,
Counsel for Jean McNeil Pepper, Executrix, etc.
I. M. Quillen,
Counsel for Scott Litton.

Leonard Hall,
Counsel for Dominion National Bank."

Q. Was that order agreed to by counsel for Jean McNeil Pepper?

A. It was.

Q. Were these orders similar to the order entered in the Circuit Court of Russell County directing payment of the funds in that case?

A. The agreed order which was entered in the Federal Court was prepared and signed and put down, as I recall, prior to the preparation and signing of the orders in the action at Bristol and the action here in the Circuit Court of Russell County. Those two orders were dictated by me in the office of George M. Warren in Bristol, to Mr. Warren's stenographer, in the presence of Mr. Warren, and, as I recall, the wording was identical, save and except the style of the suit, and the difference in parties. They were signed by Mr. Warren and myself there in his office at that time. The order was entered in Bris-
[185] tol that same afternoon, and the order which was entered in the interpleader proceeding here was entered the following day, I think.

It is agreed by counsel that the papers which have been introduced in the evidence by Mr. Quillen, which have not been actually read may be treated as having been read in this proceeding.

Q. Did I ask you whether or not the money at Bristol in the Dominion National Bank was paid pursuant to that order?

A. It had not been paid when I resigned as counsel for the Trustee. That was due to the failure of the Clerk of the Corporation Court of the City of Bristol to forward a certified copy of the order to the Bank, as I understood him to tell him to do the day he put down the order. After I was no longer counsel for the Bankrupt I did not pursue the matter further.

Q. Did these orders and petition which you have mentioned have reference to the same claim of Scott Litton and Jean McNeil Pepper involved in this suit?

A. The claims which were made in each of these suits were the same claims which are involved in this suit. That is to say, the claim of lien asserted by Scott Litton

in each of these suits were by virtue of one of the executions which is being attacked here, and the claim of Jean McNeil Pepper was by virtue of execution issued pursuant to her judgment, on which she has filed claim as general creditor. At that time, and at all times prior to that, she was claiming to be a lien creditor.

Q. Please state whether or not the proceedings
[186] at Norfolk, as well as the proceedings at Bristol and the one here and this Court has been pending for some time prior to the adjudication of the Dixie Splint Coal Company as a Bankrupt?

A. I would be unable to say how long prior, but all of them were pending at the time of the adjudication, and the referee was so advised at that meeting, as stated yesterday, and orders were entered at the first meeting of creditors, ordering the Trustee to intervene in each of thees three suits.

Were similar orders entered directing the Trustee to intervene in the suit at Lebanon, Bristol and Norfolk?

A. They will all show for themselves, they are practically identical.

CROSS EXAMINATION.

Q. I believe you stated that the suit at Norfolk was originally instituted by the Dixie Splint Coal Company, prior to its adjudication in bankruptcy?

A. It was a suit brought by Central Hanover Bank & Trust Company. The Receivers were operating the road of the Norfolk Southern, and they bought the coal from Dixie Splint Coal Company, as Receivers, and they owed for the coal.

Q. That debt was created by the Receivers, and owing to the Dixie Splint Coal Company, prior to its bankruptcy?

A. Yes, sir.

Q. And Scott Litton intervened in that suit?

A. Scott Litton did not intervene in that suit, if I understand the meaning of it correctly. Scott Litton did
this, he was made a defendant in that suit, and re-
[187] quired to answer the pleading of Jean McNeil Pepper, which had been filed in there, and also the pleading of Morris and L. H. Windholz, and he was

also required to show why he should not dismiss the garnishee, or be punished for contempt of court.

Q. And Mrs. Pepper also issued a garnishee?

A. Yes, sir, she did. I do not know that of my own personal knowledge, however.

Q. Then, later the Trustee filed petition in the case?

A. Yes, sir.

Q. And claimed all of the money?

A. Yes.

Q. And the agreed order was entered that the Trustee would take the money, and the bankrupt Court would decide to whom it was going?

A. The order will show for itself, I would rather not give my interpretation of it, because it is an order of the Court. I might say, as I recall it, the petition of course will show, that the petitioner, the Trustee in Bankruptcy, alleged it should be paid to him and administered in bankruptcy. That is my independent recollection, it may be wrong.

Q. I now read to you two paragraphs of the petition filed by P. H. Smith, Trustee, in the suit which has been *refered* to pending in the Corporation Court of the City of Bristol, which I believe was prepared by you, as follows:

"Your petitioner is further advised and avers that the action in which the alleged judgment of the said Jean McNeil Pepper Executrix, etc. was rendered in
[188] the Corporation Court of the City of Bristol, Virginia, is now pending and undetermined in the Supreme Court of Appeals of Virginia, and by reason of

void.

which your petitioner contends that any supposed lien created by execution issued on said judgment is rendered

"Your petitioner is not advised as to the validity of the supposed lien being asserted in this proceeding by Scott Litton, but is advised that the said Scott Litton has no objection to the fund now on deposit in the Dominion National Bank of Bristol, Virginia, being paid to your petitioner and administered in Bankruptcy."

Do you now assert as counsel in this case, and as a witness, that that was an election by the Trustee in Bankruptcy, who was your client, to treat the Scott Litton judgment as valid?

By Mr. Long:

Objected to because immaterial. The order speaks for itself.

Overruled.

A. I assert this as a witness, as a man, counsel, and every other way I assert after that full revelation of all the facts I was directed to intervene and ask for the money. It appeared to me that the fact that Mrs. Pepper's case was pending in the Court of Appeals was a ground. I made other allegations in there, which you have not read. I made the assertion then, in that pleading, that I was speaking for the Trustee in Bankruptcy, and for nobody else, though I represented Scott Litton, I asserted in that, as counsel for the Trustee in Bankruptcy, that I was not advised as to the validity of Scott Litton's judgment, that is to say, as counsel for the Trustee in Bankruptcy, to say that the Scott Litton judgment was good, would be for me to go beyond my prerogative, because where it was good or bad, Scott Litton agreed to it, and at the time the Trustee filed that petition, and at the time the Trustee filed his pe-

[189] tition in the suit pending in the Federal Court in Norfolk, no creditor had brought forth the question of the alleged validity of the Scott Litton judgment.

Q. Will you show the date of the filing of the petition in the proceeding at Norfolk, and also the petition in the proceeding at Bristol?

A. I have here a copy under the signature of the Clerk of the Corporation Court of the City of Bristol, permitting the filing of the Trustees petition in the City of Bristol, which is in evidence. The petition in the interpleader proceeding in this case was of the same date. The petition filed in the Court at Norfolk was probably mailed on that date, or the next day.

EXAMINATION.

By Mr. S. Bruce Jones:

Q. Mr. Quillen, wasn't this same property sold under execution of the Circuit Court of Russell County, Virginia, also sold under execution issued by the Corporation Court of the City of Bristol?

By Mr. I. M. Quillen:

This question is addressed to me by Mr. Jones of the Bristol bar, who is not a counsel of record in this case, and I would *lke* to know whom he represents.

Q. Do you represent Mrs. Jean McNeil Pepper?

A. I represent the same interest as heretofore.

Q. What interest is that, Mrs. Pepper?

A. Yes, sir.

(Question read to the witness).

By Mr. Long:

Objected to because the execution is the best
[190] evidence, and the execution was introduced yesterday.

Sustained.

By Mr. Jones:

The question of sale is a question of fact, if he knows of his own knowledge I see no reason why he should not state it.

Mr. Heuser:

For the purpose of avoiding any other confusion I am going to suggest that no one else cross examine witnesses until the plaintiff and defendant have finished. I do not think that they understand what has taken place, and I am going to ask that question be stricken out of the record.

The Court:

You mean that you are not through with your examination?

Mr. Heuser:

I would like to ask one further question.

The Court:

I think that would probably be the proper procedure in view of the fact that the matter has progressed as far as it has now.

Motion sustained at this time.

By Mr. Heuser:

Q. Mr. Quillen, I want to ask you one further question, if you know,

[191] EXCEPTION NO. 3.

At the close of the defendant's evidence in chief offered under his plea and amended plea the plaintiff, by counsel, moved the Court to exclude all of the defendant's said evidence on the ground that same was irrelevant and immaterial to the real issue of the case and on the further ground that same did not support and sustain the allegations contained in defendant's plea and amended plea; but the Court overruled the motion and refused to strike out said evidence, or any part thereof, and the plaintiff, by counsel, then and there duly excepted to the Court's said action.

Teste: This 23rd day of April, 1935.

A. G. LIVELY,
Judge.

EVIDENCE INTRODUCED BY COUNSEL FOR THE TRUSTEE.

JOHN ROBERTS, a Witness of Lawful Age, being first duly sworn, testified as follows:

[192] DIRECT EXAMINATION.

By Mr. Hamilton:

Q. Your name is John Roberts?

A. Yes, sir.

Q. What official position do you hold, Mr. Roberts?

A. Referee in Bankruptcy for the District Court of the United States.

Q. How long have you been Referee in Bankruptcy?

A. I do not know exactly, I believe about 18 years.

Q. Has the case of Dixie Splint Coal Company, a Bankrupt, been referred to you?

A. Yes, sir.

Q. Do you have with you this morning the papers in connection with that bankruptcy case?

A. Yes, sir.

Q. I will ask you whether or not your records show that Grady Aistrop has filed a claim in the bankruptcy case of Dixie Splint Coal Company, Inc.?

A. Yes, sir, he has filed claim in the sum of $94.64. It seems to have been filed under date of October 13, 1934.

Q. How much of that claim does Mr. Aistrop allege is due as a claim having priority?

A. $57.09.

Q. How much of that claim has Mr. Aistrop assigned to Price Bros.?

A. His proof of claim shows $76.00.

Q. In other words, Mr. Aistrop has assigned
[193] over to Price Bros. more than the amount of his preferred claim?

A. Yes, sir.

Q. To whom does he direct the balance of his claim be paid?

A. His proof of claim has the following words:

"$94.64. The consideration of said debt is as follows: Wages $57.09, which said amount is due for labor performed subsequent to June 4, 1934; of the above sum of $94.64 I have heretofore for value received assigned to Price Bros. $76.00, which I desire paid to Price Bros. in this proceeding and the net balance paid to me."

Q. I will ask you whether or not Price Bros. have filed a proof of claim in your Court?

A. Yes, sir, they filed a proof of claim on the 26th day of September, in the sum of $1296.00.

Q. How much do they claim of the Aistrop claim?

A. $76.00.

Q. Is that the same amount Mr. Aistrop recites he has assigned to them?

A. Yes, sir.

Q. I will ask you whether or not Mr. Scott Litton has filed a proof of claim in your Court as assignee of certain creditors?

A. Yes, sir. He has filed two or three different claims. He filed one as assignee of Southern Railway Company, but this one you have just handed me is in the sum of $55.59, and is as assignee of several of the laborers who filed general claims in this case.

Q. I will ask you to examine these assignments
[194] and see if Scott Litton has an assignment from Grady Aistrop?

A. There is no assignment from Grady Aistrop attached to this claim of $55.59. It may have been filed with some other claim, I do not recall it now.

Q. Mr. Roberts, what is the status of the Grady Aistrop claim, I mean by that, if you were declaring a dividend today, to whom would you direct the payments under the Grady Aistrop claim to be made?

By Mr. Quillen:

We object to that Your Honor. We do not think it is fair to ask the Referee to prejudge a matter.

Mr. Heuser:

The purpose of this is to show that there are other general creditors.

The Court:

I do not see the materiality of that Mr. Heuser. It seems to me that the Referee has stated that this claim of $94.64, that $76.00 has been assigned to Price Bros. and that the rest of the claim is now standing in the name of Grady Aistrop. That being true, it would seem, as a matter of course that Brady Aistrop would be entitled to any dividend due on said claim after Price Bros. If that is not a correct understanding of it the Referee may state.

A. Part of this claim goes to Price Bros., and the rest of it goes to Grady Aistrop. We did have a dividend in this case paid to the laborers on the preferred claims on which there was no dispute, but there are 8 claims here that have not been determined, just for the same reason as this. Aistrop claim. There is a discrepancy as to the amount of the secured claim and the assignment, and the Referee has not yet determined who is entitled to the secured part of the claim, and no
[195] part of these have been assigned to Mr. Litton. Also, the Price Bros. claim is not determined.

Q. Mr. Roberts, has Russell Williams filed a claim in this Court?

A. Yes, sir, he has one of these that I have just mentioned. He filed claim for $69.95.

Q. How much does he allege is preferred?

A. $29.65.

Q. How much has been assigned to Price Bros.?

A. $56.00.

Q. To whom does he direct the balance of the claim be paid?

A. The direction is practically the same as the one I have just read to the *ourt.*

Q. I will ask you whether or not so far as your records show Mr. Scott Litton has ever taken an assignment of that claim?

A. No, sir. It is not with this bunch of claims which are filed here as assigned.

Q. I will ask you if Mr. A. C. Jones has filed a proof of claim in your court, and if so, for what amount?

A. Mr. Jones has filed proof of claim in the sum of $101.64.

Q. How much of that amount does he allege as preferred?

A. $55.57.

Q. How much of that amount has he assigned to Price Bros.?

A. $86.00.

Q. To whom does he direct the balance be paid?

A. His direction is practically in the same way as the other claim I read to the Court.

Q. Do your records show that Mr. Scott Litton has taken an assignment for the balance of that claim?

[196] A. I have not checked that with reference to Mr. Jones' claim. No, sir. There is no assignment attached to the proof of assigned claims, and I do not recall that it has ever been filed under a separate assignment.

Q. Mr. Roberts, is it or not true, that the three claims just referred to are at least in part general claims?

By Mr. Quillen:

We object.

The Court:

I think the Referee has stated with reference to all of these claims.

Mr. Quillen:

We object to this because the Referee has stated that it is not determined, that exceptions have been filed and pending before him, and to ask him this question would ask him to prejudice the matter.

The Court will rule that the Referee may state the facts with reference to each of these claims as they were filed, and the exceptions, if any, that were made to the allowance of any of these claims, and their present status.

By Mr. Quillen:
Exception.

A. I think I have already stated the facts with reference to Grady Aistrop and Russell Williams' claim.

Q. State whether or not the residue of their claims is filed as a general claim?

A. Yes, sir.

Q. There has been no exception to Grady Aistrop's claim. The Referee saw the discrepancy, and decided to let these gentlemen get together and decide which one of them was entitled to the preferred part of the
[197] claim, and the same applies to the Russell Williams' claim. The claim of A. C. Jones has been excepted to by counsel for Mrs. Pepper—it is filed in writing—on the ground that he is an officer of the Company, and is not entitled to wages. I have the objection before me, I can give it in the words of the objection.

The Court:
I think that is sufficient.

A. No hearing has been had on that exception.

Q. Mr. Roberts, has P. H. Smith filed a claim in your Court?

A. Yes, sir. He has filed a claim in the sum of $369.79.

Q. Has that claim been excepted to?

A. Yes, sir.

Q. Was that claim filed as a preferred or general claim?

A. As a wage claim, preferred claim. Wages earned subsequent to June 4, 1934, which was in 90 days.

Q. I believe you have just stated that that claim has been excepted to—I will ask you to state for what reasons the claim was excepted to?

A. The claim was excepted to by Mrs. Pepper, on the grounds: (1) that said P. H. Smith was not a workman, clerk, traveling salesman, or servant of the corpora-

tion, (2) that no sums were due the said P. H. Smith as workman, clerk," etc.

By Mr. Quillen:

We move to strike out the evidence with reference to the claim of P. H. Smith for the reason that it was filed as a preferred claim, has not been allowed by the Referee in Bankruptcy, and has been excepted to by Jean McNeil Pepper on the ground that it is not a debt of the
[198] Dixie Splint Coal Company.

The Court:

Mr. Roberts, if a claim is filed as a preferred claim, and is not allowed as a preferred claim, may it or not be allowed as a general claim.

Mr. Roberts:

The party could take an appeal if he didn't like the Referee's decision.

The Court:

Suppose the claim is simply filed as a preferred claim. The claimant does nothing. You hear evidence upon the exception and consider that the claimant is not entitled to it as a preferred claim, but consider he is entitled to a common claim, assuming that he does nothing, what would you?

Mr. Roberts:

It would be allowed as a common claim.

By Mr. Quillen:

Objected to.

Overruled.

Exception.

Q. Mr. Roberts, has Jean McNeil Pepper, Executrix, etc., filed a proof of claim in your Court?

A. Yes, sir.

Q. What is the amount of her claim?

A. It, in round numbers, is for $9,000.00.

Q. Is that filed as a general or preferred claim?

A. As a general claim.

Q. Has that claim been excepted to?

A. Yes, sir.

Q. By whom?

A. It is excepted to by M. M. Long and I. M. Quillen, counsel for Scott Litton.

Q. Has that exception been passed upon?

A. No, sir. The ground of the exception is that the matter is pending in the Supreme Court of Appeals of Virginia, it will not be passed upon by the Referee until the question is settled there. I might add that the

[199] claim is based on a final decree of the Corporation Court of the City of Bristol, granting Mrs. Pepper a judgment in the sum of $9,000.00.

Q. I hand you petition and Schedule of Dixie Splint Coal Company, and will ask you to state the date of the filing of the petition?

A. On the 4th day of September, 1934, at 3:30 P. M.

Q. How much time after a petition is filed do creditors have within which to file proof of claim?

By Mr. Quillen:

Objected to.

Overruled.

A. They have 6 months.

Q. Mr. Roberts, is it now possible for you to judicially determine who have general claims, and who have preferred claims in the matter of Dixie Splint Coal Company, a Bankrupt?

A. The creditors still have further time within which to file claims, and these that have been filed, I cannot determine until a hearing is had, after due notice, to the parties involved.

CROSS EXAMINATION.

By I. M. Quillen:

Q. Mr. Roberts, was the direction of the bringing of this suit, granted upon the request of any particular creditor?

The Court:

You mean the bringing of this action here now?

A. Yes, sir.

A. Well, if it was any creditor it was Mrs. Pepper.

I do not recall just exactly. I believe Mrs. Pepper did file a petition asking that this suit be instituted.

Q. I will ask you to look at your records and
[200] determine whether or not it is a fact that she filed a petition?

A. Mrs. Pepper filed a petition which seems to ask that the Trustee intervene in a suit which was then pending in the Circuit Court of Russell County.

Q. What suit was that, Mr. Roberts?

A. I suppose it was a suit she had instituted.

Q. Does the petition state what suit it was?

A. It is a great long petition here, I don't know just what all it does state.

Mr. Quillen:

I will not insist on an answer to that question, because a copy of this paper has been filed.

Q. What was the date of the filing of that petition?

A. 15th of October, 1934.

Q. And you entered an order pursuant to the filing of that petition, directing intervention in the Circuit Court of Russell County?

A. No, not on this petition. We had a hearing on this petition, and I entered an order directing the Trustee to employ counsel, and bring an independent suit to test the validity of this judgment.

Q. To refresh your memory, Mr. Roberts, I hand you paper which has been introduced in evidence, purporting to be a copy of the petition which you have there. Is that a copy of it?

A. Yes, it appears to be a copy of it.

Q. I hand you what purports to be an order entered pursuant to that petition, and ask you whether you entered that order?

A. Yes, sir, I believe you are correct about that.
[201] I did enter order on that petition directing the Trustee to intervene in the suit.

Q. The order you refer to is an order of yours under date of October 17, 1934, which has been filed in evidence?

A. Yes, sir.

Q. Is it not a further fact, Mr. Roberts, that counsel for Scott Litton asked you to rehear that order?

A. Yes, I believe that is a fact, that there was a rehearing and then the order was entered.

Q. Is it not a further fact that a rehearing of that order was granted, and that upon that rehearing you entered an order on the 8th day of November, 1934, designating Messrs. Hamilton and Heuser as counsel for the Trustee, and directing them to report to you their recommendations.

A. I think the order will show better than I can tell you. As I now recall, that is what took place.

Q. Now, the order entered on the 8th day of November, 1934, by you, was for the specific purpose of rehearing this former order which we have just referred to, was it not?

A. I believe it was.

Q. And I believe you state that that was your recollection that the matter was referred to Messrs. Heuser & Hamilton, what recommendation did they make to you as to what action should be taken?

A. They filed a little petition under date of November 27th.

Q. And in that *ptition* they recommended that this present suit be instituted, or a proceeding of the same nature?

A. Yes, sir.

[202] Q. And pursuant to that petition you entered the order which directed them to bring this proceeding, is that true?

A. I think so. That order will show better than I can tell you from memory.

Q. Then, it is true, is it not, that this proceeding is instituted pursuant to the petition which Jean McNeil Pepper filed asking for intervention in a former suit?

A. Yes, sir. It appeared there would be some conflict in the interest of counsel, and at a hearing on Oct. 8th the Referee thought it better to have disinterested parties and pursuant to that, that they filed this petition of Oct. 27th.

Q. Mr. Roberts, no other creditor of the Bankrupt estate has expressed to you any desire to have such proceeding as this instituted, other than Jean McNeil Pepper?

A. I do not believe they have.

RE EXAMINATION.

By Mr. Heuser:

Q. I believe it has been mentioned that counsel for Scott Litton asked for a review of the order?

A. Yes, sir, there was a petition filed to that effect in this case, and the matter was re-heard.

Q. And the Referee went on then and directed that other counsel be employed. Did counsel for Scott Litton take any appellate proceeding, asking that the Referee's order be overruled and reversed in the appellate court?

By I. M. Quillen:

Your Honor, please, if that refers to a pro-
[203] ceeding objecting to the employment of counsel, I want to say this, that it was upon suggestion of counsel for Scott Litton, and with their entire approval.

Mr. Heuser:

That was not the purpose of the question at all.

The Court:

What was the date of that?

On Oct. 19th, and between then by two other letters.

By Mr. Heuser:

I will ask this question.

Q. Did Scott Litton, by counsel, take the necessary steps to appeal from the Referee's orders directing the Trustee to bring the present suit, which they had a right to do?

By Mr. Quillen:

Objected to because irrelevant and immaterial.

The Court:

Just what is the purpose of that question.

Mr. Heuser:

Possibly I should have asked another question.

Q. Counsel for Scott Litton did not very strenuously oppose the entering of this order in the first place?

A. Yes sir, I think they did oppose the entering of the order.

Q. But they did not appeal from the order?

By Mr. Quillen:
We object.
Overruled.
Exception.

A. They did not appeal.

[204] RE-CROSS EXAMINATION.

By Mr. Quillen:

Q. Mr. Roberts, I believe you have stated, I am not sure, that all uncontested claims have been paid, save and except one or two in which there appeared to be a discrepancy?

A. All of the labor claims have been paid, except about 8 in which there are discrepancies, and then, there are three or four to which exceptions have been filed.

Q. Did I understand you to say there were 8 labor claims which had not been paid?

A. I believe there are 8 of them.

Q. Will you give me the names of them please?

A. Grady Aistrop, Russell Williams, Jack Breeding, J. W. Jones, Paul Creed, Bud Vance, Wm. Breeding, Henry Gilbert. These are the ones that appear to have discrepancies.

Q. They were not excepted to?

A. No, sir.

Q. Give the names of the ones that have been excepted to?

A. P. H. Smith, A. C. Jones and Scott Litton. These are all labor claims. Of course, Mr. Litton filed a second claim based on the judgment involved in the proceeding which you have here. And Mrs. Pepper's claim, of course we have already stated, has been excepted to. There is one other claim, Price Bros. has been excepted to.

Q. All other preferred claims have been paid?

A. Yes. There are some other claims assigned to Mr. Litton which have not been paid, but there have been no exceptions taken to them.

[205] COURT ADJOURNED UNTIL 1:15 P. M.

MR. ROBERTS' EVIDENCE Continued:

By Mr. S. B. Quillen:

Q. I will ask you to state please, Mr. Roberts, after I. M. Quillen had declined to act as counsel for the Trustee in the suits pending in Russell County by Mrs. Jean McNeil Pepper, attacking the judgment of Scott Litton, and your letter to him, copies of which were sent to A. K. Morison, one of the attorneys for Jean McNeil Pepper, suggesting that Mr. Morison, or some of Mrs. Pepper's attorneys might represent the Trustee, and after the Attorneys of Mrs. Pepper had declined to represent the Trustee, you received a letter from Mr. Morison stating that after consultation with the other attorneys they had decided they would represent the Trustee in these suits pending in Russell County?

A. I do not recall.

Q. To refresh your memory I hand you herewith a letter purporting to be signed by A. K. Morison, addressed to you as Referee in Bankruptcy, dated Octo. 31, 1934, which has been filed by you in the papers in the Bankruptcy proceeding, and copy of your reply to him under date of Nov. 1, 1934, and ask you if this is the letter you received, and your reply?

A. Did you get this from my bankruptcy file, Mr. Quillen?

Q. Yes, sir, it came from your file.

A. Yes, sir, this is letter which I received from Mr. Morison dated Oct. 31, and I replied to it on November 1st.

Q. I will ask you to please file copies of these letters with your evidence in this case?

By Mr. Heuser:

We object to the filing of these letters.

[206] Overruled.

Exception.

The first letter, on the stationary of Morison, Morison & Rouse,

"October 31, 1934.

Hon. John Roberts,
Referee in Bankruptcy,
Norton, Va.

Dear Mr. Roberts:

Re: *M*-1321-*Dixie Splint Coal Company, Bankrupt, In Bankruptcy:*

After conference with my associate we have concluded to accede to your suggestion and represent the Trustee in the Circuit Court of Russell County, on motion to quash the execution in the Chancery suit to vacate and set aside the said judgment as null and void.

Yours very truly,

A. K. MORISON."

AKM:ms

"Nov. 1, 1934.

Mr. A. K. Morison, Attorney,
Bristol, Va.

Dear Sir:

Re: *Dixie Splint Coal Company, Bankrupt:*

I note your letter of October 31 saying that after conference with your associates you had concluded to represent the trustee before the circuit court of Russell County in a motion to quash the execution issued
[207] on the alleged judgment of Scott Litton and in the chancery suit to set aside the judgment as null and void.

I saw Mr. Ira Quillen, counsel for Mr. Litton, a day or so ago and he stated that as he had no notice of the entry of the order directing the trustee to intervene in the above matters that he was considering filing a petition asking for reconsideration of the order and an actual hearing on the petition. I take it that if such petition is to be filed it will be done within the next few days, and perhaps it will be best to hold up this matter a few days until Mr. Quillen has time to file such petition. It

may be that the referee should have given notice and had a regular hearing before the entry of the order, but I have made no conclusion as to that and will not make any until the petition comes in.

Yours very truly,

JOHN ROBERTS,
Referee in Bankruptcy.

JR/LB

CC: I. M. QUILLEN, Attorney.
Lebanon, Va.

Q. The notation on the bottom "CC: I. M. Quillen, Atty.", does that mean you sent I. M. Quillen copy of this letter?

A. Yes, sir.

Q. And you sent the original to Mr. Morison?

A. Yes, sir.

[208] RE-EXAMINATION.

Q. As mentioned in your letter to Mr. Morison, a hearing was held on that order, was it not?

A. Yes, sir. We went over that awhile ago.

By Mr. Long:

Q. Mr. Roberts, when you were on the stand this morning you spoke about 8 labor claims that were in about the same shape as the Grady Aistrop claim and the Russell Williams claim?

A. Yes, sir.

Q. Now, these claims, I believe, are Grady Aistrop, Russell Williams, Jack Breeding, J. W. Jones, Paul Creed, Bud Vance, Wm. Breeding, and Henry Gilbert?

A. Yes, sir.

Q. I believe the Haney Gilbert claim shows that Dixie Splint Coal Company was due him $7.00 of which amount $6.00 had been assigned to Price Bros.?

A. Yes, sir, that is right.

Q. The claim of Wm. Breeding shows that Dixie Splint owed him $1.00, all of which had been assigned to Price Bros.?

A. Yes, sir.

Q. The claim of Bud Vance shows that Dixie Splint Coal Company was due him $87.87, of which amount $49.00 had been assigned to Price Bros.

A. That is right.

Q. The claim of Paul Creed shows that Dixie Splint Coal Co., owes him $49.98, and the entire amount had been assigned to Price Bros.?

A. Yes, sir, that is correct.

Q. The claim of J. W. Jones shows that Dixie
[209] Splint Coal Company owed him $60.00, all of which had been assigned to Price Bros.?

A. Yes, sir.

Q. The claim of Jack Breeding shows that Dixie Splint Coal Company owed him $18.29, of which amount $17.00 had been assigned to Price Bros.?

A. Yes, sir.

Q. The claim of Russell Williams shows that Dixie Splint Coal Company owed him $59.55, of which amount $56.00 had been assigned to Price Bros.?

A. Yes, sir.

Q. And the Grady Aistrop claim shows that Dixie Splint Coal Co. owed him $94.64, of which amount $67.00 had been assigned to Price Bros.?

A. Yes, sir.

REBUTTAL EVIDENCE FOR DEFENDANTS.

By M. M. Long:

The Witness P. H. SMITH, Recalled:

Q. Mr. Smith, I notice that reference is made to your claim against the bankrupt, Dixie Splint Coal Company, in which it is stated that it is for "wages due for services performed subsequent to June 4, 1934, which said sum I desire paid to me in this proceeding". Is that statement correct as to the time the labor was performed for Dixie Splint Coal Company?

By Mr. Huser:

I object.

Sustained.

By Mr. Long:
Exception.

Q. With reference to your claim of $365.39,
[210] which you have filed in the bankruptcy proceeding of the Dixie Splint Coal Company, and which has been excepted to by Jean McNeil Pepper, please state whether or not, if this claim is disallowed as a preferred claim, whether you will claim any part of this amount as a general claim against the Bankrupt.

By Mr. Heuser:
Objected to because irrelevant and immaterial.

The Court:
I think the witness may state.

Excepted to by Mr. Heuser.

A. I filed my claim as a preferred claim, and will prosecute only on that basis. If it develops it is a common claim I will withdraw it.

Q. Regardless of what kind of claim it is, do you desire to take any action toward attacking or setting aside the judgment of Scott Litton against Dixie Splint Coal Company, as a creditor?

A. No, sir.

Q. Mr. Smith, I believe you were Secretary & Treasurer of the Dixie Splint Coal Corporation?

A. Yes, sir.

Q. As such you had charge of the books and accounts of the coal company?

A. Yes, sir.

Q. I hand you herewith a slip of paper, dated June 4, 1934, reading as follows: "Dixie Splint Coal Company
D4998, Price Brothers: Please deliver to Grady
[211] Aistrop, Thirty-Six Dollars ($36.00) in Scrip, and charge to the account of Dixie Splint Coal Company. Received self, signed P. H. Smith, Cashier," and on the back of it is endorsed the following: "For value received, I hereby assign to Price Brothers the within amount, due me from any wages by Dixie Splint Coal Company and held in trust by them, Grady Aistrop."

State whether or not you issued that order to Price Bros., for Grady Aistrop, and what it represents?

A. I did. It represents earnings of this man.

Q. Was that the amount which was due Mr. Aistrop on that date by Dixie Splint Coal Company, the full amount due him?

A. Yes, sir. Up to that time.

Q. I desire to introduce this in evidence.

Q. I also hand you herewith another order dated "Clinchfield Virginia, June 4, 1934, Dixie Splint Coal Company, No. D4994 PRICE BROTHERS, Please deliver to Russell Williams, Forty-two Dollars, ($42.00) in Scrip and charge to the account of Dixie Splint Coal Company. Received self, P. H. Smith, Cashier." And endorsed on the back "For value received I hereby assign to Price Brothers the within amount from any wages due me by Dixie Splint Coal Company and held in trust by them. Russell Williams."

State whether or not you issued that order to Russell Williams?

A. I did.

Q. What does that order represent?

A. Earnings—wages.

[212] Q. Up to what time, and by whom?

A. Up to June 4th, 1934.

Q. For wages due him by Dixie Splint Coal Company to that time?

A. Yes, sir.

Q. Do you know who is the holder of this order of Grady Aistrop and Russell Williams?

A. Price Brothers.

Q. I desire to introduce in evidence the Russell Williams order.

Q. I show you another order, dated "Clinchfiled, Virginia, June 4, 1934, Dixie Splint Coal Company, D4994 Price Brothers: Please deliver to Bud Vance, Thirty-Seven Dollars ($37.00), in Scrip, and charge to the account of Dixie Splint Coal Company. Received self, P. H. Smith, Cashier." Endorsed on the back as follows: "For value received I hereby assign to Price Brothers the within amount from any wages due me by Dixie Splint Coal Company, and held in trust by them. Bud Vance."

Please state what that is?

A. That represents earnings of this man for labor.

Q. To what period?

A. Up to June 4, 1934.

Q. Was that the full amount Dixie Splint Coal Company owed Bud Vance on June 4, 1934?

A. The full amount due him at that time.

Q. Who holds this order now?

A. Price Brothers.

Q. Mr. Smith, I hand you herewith another [213] order, dated "Clinchfield, Va. June 4, 1934, No. D4996, Price Brothers. Please deliver to A. C. Jones, Forty-Six Dollars ($46.00) in Scrip, and charge to the account of Dixie Splint Coal Company. Received Self, P. H. Smith, Cashier. Endorsed on the back: "For value received I hereby assign to Price Brothers the within amount from any wages due me by Dixie Splint Coal Company and held in trust by them. A. C. Jones."

I will ask you to state what that is please?

A. That represents earnings for labor performed before June 4, 1934.

Q. Was that the full amount Dixie Splint owed A. J. Jones on June 4?

A. Yes, sir.

Q. Who owns this order now?

A. Price Brothers.

Q. We desire to introduce this in evidence.

CROSS EXAMINATION.

By Mr. Heuser:

Q. Mr. Smith, I believe you state that Price Brothers now own each one of these orders?

A. Yes, sir.

Q. I believe the date on that, June 4th, just happens to be 90 days before the petition in bankruptcy was filed?

By Mr. Quillen:

We object.

Q. So any money due prior to June 4, would be a general claim in bankruptcy?

By Mr. Quillen:

We object to that because it asks for conclusion of this witness.

Sustained.

Q. These orders are for wages earned prior
[214] to June 4, 1934?

A. Yes.

Q. Mr. Smith, I believe I understood you to say that should your preferred claim filed in bankruptcy *would* be treated by the bankrupt court as a general claim you would simply withdraw it?

A. Yes, if it is not a preferred claim I will withdrow it.

Q. Why would you do that?

By Mr. Quillen:
We object.
Overruled.

A. For the reason that it would not be worth anything.

Q. Would you or not wait and see whether or not it would stand up?

A. If it is not a preferred claim I would withdraw it.

Q. When did you form that intention, Mr. Smith?

Mr. Quillen:
Objected to because immaterial and irrelevant.
Overruled.
Exception.

A. Not at any special time.

Q. It was not called to your attention until to-day?

By Mr. Quillen:
Same *objction.*
Overruled.
Exception.

A. I have discussed it.

Q. Whom have you discussed it with?

By Mr. Quillen:
Objected to.
[215] Overruled.
Exception.

A. I do not recall just now. I thought about it be-

forehand, and I believe I have discussed it possibly with Mr. Litton.

Q. Do you remember what you said to Mr. Litton about it?

By Mr. Quillen:

We object.

Overruled.

Exception.

Q. You would not, of course, take the trouble to withdraw your claim in bankruptcy, if you thought by so doing it would tie your hands as Trustee in properly getting in the assets of the case?

A. No answer.

Q. To this date you have not filed any pleading stating that you will withdraw your claim if it is not allowed as a preferred claim?

A. No, sir.

Q. You have not made that known to the Referee in any way whatever?

A. No, sir.

Witness stands aside.

The Witness SCOTT LITTON, Recalled:

By M. M. Long:

Q. Mr. Litton, I believe you were President of the Dixie Splint Coal Company?

A. That is correct.

Q. Do you know Grady Aistrop, Russell Williams, Bud Vance, Henry Gilbert, and Jack Breeding, Wm. Breeding?

A. Yes, sir.

[216] Q. Were they employees of the Dixie Splint Coal Company?

A. Yes, sir.

Q. Are they employed now of the Dixie Beaver Coal Company, with the exception of Wm. Breeding?

A. They all are with the exception of Haney Gilbert.

Q. Who is President of the Dixie Beaver Coal Company?

A. Scott Litton.

Q. Do any of these employees desire to attack your judgment against the Dixie Splint Coal Company?

By Mr. Heuser:
We object.
Sustained.

Mr. Quillen:
We desire the witness to answer for the record.

A. Most of these men have worked for me for a long time, and in purchasing some of the general claims I discussed the matter with them, and they assured me they would be willing to do anything they could that was honest to assist me in any way they could.

Q. Have you paid all of the money for all of their labor prior to the 6th day of June, 1934?

A. They assigned that money due them at that time for *script* at Price Brothers.

Q. Do you have an assignment of Haney Gilbert, Jack Breeding and Bud Vance, dated the 6th day of November, 1934 of any and all amounts due them up to that date?

A. I have.

Q. Were these assignments filed with your [217] proven claim in bankruptcy?

A. They were.

Mr. Long:
We desire to read the assignment of Haney Gilbert.

Mr. Hamilton:
We raise no question about those three you are going to read.

Assignments read as follows:

"ASSIGNMENT."

"For and in consideration of the sum of $1.75, I hereby sell, transfer, assign and set over to Scott Litton the amount due me for labor as a general claim against the Dixie Splint Coal Company, Bankrupt, for labor performed prior to June 5th, 1934, including all rights

to prosecute for said claim. Dated Clinchfield, Virginia, this 6th day of November, 1934.

HANEY GILBERT,

Personally appeared before me this date Haney Gilbert, known to me, who has acknowledged the signature to the foregoing Assignment under oath. Dated at Clinchfield, Virginia, this 6th day of November, 1934.

FRANCES SMITH,
Notary Public.

My commission expires Nov. 1st, 1936."

"ASSIGNMENT."

"For and in consideration of the sum of $2.55, I hereby sell, transfer, assign and set over to Scott Litton the amount due me for labor as a general claim [218] against the Dixie Splint Coal Company, Bankrupt, for labor performed prior to June 5th, 1934, including all rights to prosecute for said claim. Dated at Clinchfield, Virginia, this 6th day of November, 1934.

JACK BREEDING.

Personally appeared before me this date, Jack Breeding, known to me, who has acknowledged the signature to the foregoing Assignment under oath.

Dated at Clinchfield, Virginia, this 6th day of November, 1934.

FRANCES SMITH (Seal)
Notary Public."

My commission expires November 1st, 1935."

"ASSIGNMENT."

For and in consideration of the sum of $2.25. I hereby sell, transfer, assign and set over to Scott Litton the amount due me for labor as a general claim against the Dixie Splint Coal Company, Bankrupt, for labor

performed prior to June 5th, 1934, including all rights to prosecute for said *caim*. Dated at Clinchfield, Virginia, the 6th day of November, 1934.

BUD VANCE.

Personally appeared before me, this date, Bud Vance, known to me, who has acknowledged the signature to the foregoing Assignment under oath.

Dated at Clinchfield, Virginia, this 6th day of November, 1934.

FRANCES SMITH."

(SEAL).

My commission expires November 1st, 1936."

Q. Mr. Litton, have you examined these orders
[219] given by Dixie Splint Coal Company to Russell Williams, Bud Vance, A. C. Jones, and Grady Aistrop, dated June 4, 1934?

A. Yes, I identified these orders.

Q. Please state whether or not that is the amount Dixie Splint owed them in full?

A. Dixie Splint Coal Company's funds were tied up by an attachment of Mrs. Pepper, and we did not have money to operate. I went to Price Brothers and made arrangements whereby the amounts were assigned to Price Bros.

Q. Was this the amount they had earned?

A. Yes, and it was assigned to Price Bros., as of that date.

Q. Mr. Litton, it appears from these orders that these 8 men have been paid in full, but if it should develop that there is anything behind for wages due prior to June 4th, please state whether or not you intend to pay these men in full?

By Mr. Hamilton:

We object to this because incompetent.

Sustained.

Exception.

Mr. Quillen:

We desire the witness to answer for the benefit of the record.

A. I told these men that if they would work on for me I would see that they did not lose anything, that this judgment had been gotten against the corporation, and the machinery and equipment had been levied on, and I told the men I would see that their wages were paid.

Q. Do you expect to do that?

[220] A. I certainly do.

Q. Your particular intention would be to pay anything owing prior to June 4th?

A. I do not think I would have to pay anything after that, because the Corporation has plenty of money to pay preferred claims.

Q. Price Brothers are now the owners of the claims evidenced by these little *script* orders?

A. They are.

Witness stands aside.

The Witness WALTER PRICE, being first duly sworn, testified as follows:

By M. M. Long:

Q. What are your initials, Mr. Price?

A. W. G. Price.

Q. Are you a member of the partnership doing business as Price Bros.?

A. I am.

Q. Who composes that partnership?

A. F. H. Price and myself.

Q. I believe that Price Bros. have filed assignments of certain labor claims?

A. Yes, sir.

Q. In filing that claim, did you and do you now rely upon it as a preferred claim?

A. Yes, sir, I do.

Q. As to any portion of it which is not a pre-

[221] ferred claim, which may be adjudged not to be a preferred claim, do you now, or will you ask its allowance as a general claim?

A. No, sir, just the preferred claim.

Q. If I understand you correctly, under the claim you have filed you rely on it solely as a preferred claim?

A. Yes, sir.

Q. Do you desire, or has it ever been your wish,

to prosecute this suit by the Trustee in bankruptcy to void Mr. Litton's judgment?

A. No, sir.

Q. Does that apply also to the partnership, as well as to yourself?

A. Yes, sir.

CROSS EXAMINATION.

Mr. Heuser:

Q. You now state to this Court that if the Bankrupt courts should allow part of your claim as a general claim, instead of a preferred claim, that you would refuse to receive any dividend?

A. I am only asking for a preferred claim.

Q. What if the Bankrupt court should decide that part of your claim was a common claim, and part of it a preferred claim, would you refuse to take any dividend that might be due you?

A. The preferred claim is what I asked for.

Q. Yes, I understand that, but I don't believe you have answered my question.

A. The preferred claim is what I ask for, and if there is anything besides the preferred claim, I did not ask for it?

Q. And you would not receive it?

By Mr. Quillen:

We object.

[222] Overruled.

Exception.

A. The preferred claim is what I asked for, and I don't know as I would want anything except the preferred claim.

Q. Do you state positively that you would not take anything on a common claim?

A. Well, I don't know as I would.

Q. You won't say that you would not?

By Mr. Quillen:

I object.

Overruled.

Exception.

A. No.

Q. When was the first time it ever occurred to you, or you ever thought of the proposition that part of your claim might be allowed as a preferred claim, and part as a common calim?

A. I have not given any thought to it.

Q. Today was the first time that matter ever entered your mind?

A. No.

Q. When was it?

A. The day we filed it as a preferred claim, and if it is not a preferred claim we are not asking for it.

Q. Did it ever occur to you that it might not be allowed as a preferred claim before today?

By Mr. Quillen:

We object.

A. I had thought about it, but I don't know whether I could say that I knew it or not.

Q. When did you make up your mind, if you
[223] have, that if any part of your claim was allowed as a common claim that you would not receive it?

A. I do not know as I have made up my mind at all.

Q. You had not given much thought to it before now?

A. No, sir.

Q. You have not filed any pleading in the Bankrupt court to that effect?

A. No.

Q. You gave value received for assignment of these claims?

A. Yes, sir.

Q. You are not a charitable institution, are you?

By Mr. Quillen:

We object.

Sustained.

DEFENDANT RESTS.

Mr. Heuser:

Your Honor, the plaintiff is ready to rest its case, but before doing so, I understand that some of counsel,

who have appeared Amicus Curiae, desire to offer some evidence.

Mr. Quillen:

We object to anybody not a party to the suit offering any evidence.

Mr. Jones:

If your Honor please, according to the arrange-
[224] ments previously made, by Your Honor there are a few questions and a few things we would like to bring out. The turn this question has taken it looks as if the rights of Mrs. Pepper might seriously be affected.

Mr. Long:

In the trial of any case there must be an issue made. The issue in this case is between P. H. Smith, Trustee in Bankruptcy on the one side, and Scott Litton on the other. Mrs. Pepper does not appear in this suit as a party to the suit, and she has not filed a petition; I think it is certainly foreign to any issue now to permit her to air her side of the matter. She had an opportunity and failed to avail herself of it. The record shows beyond a doubt that she is estopped from raising her voice in this case.

The Court:

It does not seem to me that it would be orderly procedure to permit the introduction of this evidence at this time.

Mr. Jones:

Do I understand that the record is to show no appearance on the part of Mrs. Pepper?

The Court:

I think the record can show just what has occurred. I would not undertake to rule on whether there has been an appearance or not. The record will show just what has occurred.

However, I think for the purpose of the record you may introduce your testimony here.

Mr. Long:
We object.

The Court:
If Mr. Jones desires to introduce some testimony for the record I think he may do that.

Mr. Quillen:
We object to the evidence being introduced for the purpose of the record and if it is to be taken in writing Mr. Jones will have to make his own arrangement about taking it.

[225] The court will permit counsel for Jean McNeil Pepper to offer their evidence for the record, but it will not be considered by this Court.

Mr. Heuser:
Counsel for plaintiff wants to be understood in taking the position that in so far as the cost of this record is concerned we are no party to that. We wish the record to further show that we object to any evidence which counsel for Jean McNeil Pepper, Administrator, may introduce being included in the cost of the record of P. H. Smith, Trustee v. Scott Litton, in so far as we are concerned.

The Court:
As I understand, it is the attitude of counsel for both the plaintiff and defendant that they oppose evidence being introduced by Jean McNeil Pepper?
Yes, sir. We simply do not want to petition the Bankrupt court to pay for something which we do not think is material.

Mr. Jones:
The record can stand as it is, so far as we are concerned.

Mr. Heuser:
Counsel for plaintiff moves to strike out all of the evidence on behalf of the defendant, on the ground that

it is irrelevant to any proper issue in this action, and for the further reason that it failed to sustain the allegations contained in defendant's plea and amended plea, and we further wish to be understood as relying on our motion to strike out the plea and amended plea.

By the Court:
Overruled.

Mr. Heuser:
We except to the Court's ruling.

Mr. Quillen:
Your Honor please, we desire at this time to re-
[226] new our demurrer which was tentatively overruled, and to submit additional authority thereon. We desire further to renew our motion to dismiss the action, because of lack of evidence, and because of the absence of any evidence at all in support of the plaintiff's motion. And we further desire to be heard in argument on all of the points.

[227] CERTIFICATE AS TO THE EVIDENCE.

The foregoing evidence on behalf of the plaintiff and of the defendant, respectively, as therein denoted, is all the evidence that was introduced on the trial of this action.

Teste: This 23rd day of April, 1935.

A. G. LIVELY,
Judge.

[228] EXCEPTION NO. 4.

At the conclusion of all the evidence in the case the plaintiff, by counsel, moved the court to exclude and strike out all the evidence offered by the defendant on the ground that same was irrelevant and immaterial to the real issues of the case and on the further ground that same did not support and sustain the allegations contained in the defendant's plea and amended plea; but the Court overruled the motion and refused to strike out the defendant's evidence, or any part thereof, and

the plaintiff by counsel, then and there duly excepted to the Court's said action.

Teste: This 23 day of April, 1935.

A. G. LIVELY,
Judge.

[229] EXCEPTION NO. 5.

The following question, propounded by P. H. Smith, called as adverse witness by the defendant, upon the examination by Mr. Heuser, counsel for the plaintiff:

"Q. Why did they withdraw the claim?"

was objected to by the defendant, and the Court sustained the objection, but allowed the witness to answer for the purpose of the record:

"A. My understanding is that Mr. Litton purchased these claims."

and the plaintiff then and there duly excepted.

Teste: This 23 day of April, 1935.

A. G. LIVELY,
Judge of the Circuit Court of
Russell County, Virginia.

[230] EXCEPTION NO. 6.

The following question, propounded to P. H. Smith, recalled as an adverse witness in rebuttal, upon the cross-examination by the defendant:

"Q. With reference to your claim of $365.39, which you have filed in the bankruptcy proceeding of the Dixie-Splint Coal Company, and which has been excepted to by Jean McNeil Pepper, please state whether or not, if this claim is disallowed as a preferred claim, whether you will claim any part of this amount as a general claim against the Bankrupt?"

was objected to by the plaintiff on the grounds that it is irrelevant and immaterial to any issue in this case, but the Court allowed the witness to answer, and he did answer the same as follows:

"A. I filed my claim as a preferred claim, and will prosecute only on that basis. If it develops that it is a common claim, I will withdraw it."

and the plaintiff then and there duly excepted.

Teste: This 23 day of April, 1935.

A. G. LIVELY,
Judge of the Circuit Court of
Russell County, Virginia.

[231] EXCEPTION NO. 7.

The following final order or judgment was entered in the case by the Court on the 8th day of March, 1935:

"This case came on to be heard on February 21, 1935, on plaintiff's written motion to have the judgment therein declared void and to quash the executions issued thereon, and thereupon the defendant, by counsel, filed his demurrer to said motion, which demurrer the Court overruled and the defendant, by counsel, then and there excepted, and thereupon the defendant, Scott Litton, filed his plea to said motion, whereupon the plaintiff filed his written motion to strike out said plea which motion the Court overruled, to which ruling of the Court the plaintiff, by counsel, then and there excepted and thereupon the Dixie Beaver Coal Company, a corporation, tendered and asked leave to file its petition in this case, to the filing of which the plaintiff, by counsel, objected and which objection the Court sustained and declined to permit said petition to be filed, to which ruling of the Court in refusing to permit the filing of the same, the Petitioner, by counsel, then and there excepted, and thereupon the plaintiff replied generally to defendant's plea, and thereupon the Court proceeded to hear evidence of witnesses offered by the plaintiff and the defendant, and counsel for the plaintiff and for the defendant, respectively, asked for and were given time within which

to file briefs in this case, and said case came on this day to be heard upon the pleadings, evidence and briefs of counsel for plaintiff and defendant, as well as upon the brief of counsel for Jean McNeil Pepper, and the Court being of the opinion that the plaintiff is not entitled to the relief prayed for doth refuse to grant the same and doth dismiss this case at the costs of the plaintiff."

and was then objected to by the plaintiff, by counsel, on the ground that same, in refusing to grant the relief prayed for by the plaintiff and in dismissing the case, was contrary to the law, contrary to the evidence, and contrary to the law and the evidence of the case.

Teste: This 23 day of April, 1935.

A. G. LIVELY,
Judge.

[232] EXCEPTION NO. 8.

The following question, propounded to Scott Litton, witness for the defendant, upon re-cross examination by Mr. Heusel, counsel for the plaintiff:

"Q. Why did you buy all the general claims except Mrs. Pepper's."

was objected to by Mr. Quillen, counsel for the defendant, and the Court sutained the objection, and the witness did not answer.

And the plaintiff then and there duly excepted.

Teste: This 23 day of April, 1935.

A. G. LIVELY,
Judge.

[233] EXCEPTION NO. 9.

The following question, propounded to P. H. Smith, called as an adverse witness by the defendant, upon cross-examination by Mr. Quillen, counsel for the defendant:

"Q. I hand you what purports to be the Minute Book of the Dixit Splint Coal Company, and will ask you to read the Minutes of the meeting found on page 141?

was objected to by the plaintiff because irrelevant and immaterial, and because ratification was not plead by the defendant, and the Court overruled the said objection and allowed the witness to read as follows:

"A. At the annual meeting of the stockholders of the Dixie Splint Coal Company, Incorporated, held at its principal office at Clinchfield, Virginia, on December 15th, 1933.

The meeting was called to order by Scott Litton, acting as Chairman, and P. H. Smith, acting as Secretary. On roll call it was found that all stock-holders, representing the entire *outstand* stock of the company, were present, Minutes of the previous meeting was read and also the minutes recorded of the Directors meeting were read and approved. Waiver of notice was accepted by all stockholders.

Scott Litton, President of the Company made a report as to the future prospects of the company, stating therein that he had agreed to accept a salary reduction of $2,000.00 a year, and stated that should the company secure sufficient business to justify the raising of this salary that he would expect it to be raised at some future date.

The question of indebtedness to Scott Littton was discussed and he informed the stockholders that he felt like he should not be asked to carry this indebtedness indefinitely, and indicated his desire to have some action taken on the question of payments on the judgment, which the corporation had confessed in his favor in June 1933, which action of the Directors is hereby ratified and confirmed by the stockholders. A lengthy discussion of future prospects of the company was gone into by all stockholders, and it was decided to try future operations, with the view of gaining back some of the losses of the company over the past two or three years.

The next in order was the election of directors, and upon motion duly made and seconded, the previous directors were re-elected to serve for a period of twelve months, namely: Scott Litton, P. H. Smith, and Pauline Jones Litton.

There being no further business before the meeting, and upon motion the meeting adjourned.

[234]

SCOTT LITTON,
Chairman.

P. H. SMITH,
Secretary."

and the plaintiff then and there duly excepted.

Teste: This 23 day of April, 1935.

A. G. LIVELY,
Judge.

And now, on this 23 day of April, 1935, and within sixty (60) days from the date of the final order or judgment, came the plaintiff by counsel and tendered this its Certificate of exception and certificate as to the Evidence, and it appearing that notice in writing has been duly given to the attorneys for the defendant of the time and place at which said certificates were to be so tendered to the undersigned Judge of the Circuit Court of Russell Co., Va., and the Court finding said certificates, and each of them, to be proper, and they containing all the evidence in the case and all exceptions taken and reserved doth now sign the same and make them a part of the record in this case, the same to be forthwith transmitted to the Clerk of said Court and filed by him with and as a part of the record.

[235]

Given under my hand as Judge of said Court, before whom the trial of the case was had.

A. G. LIVELY,
Judge of the Circuit Court of
Russell County, Virginia.

Circuit court of the County of Russell on Friday the 15th day of February, in the year of our Lord, one thousand nine hundred and thirty-five.

[236]

Present: The Honorable A. G. Lively, Judge.

P. H. Smith, Trustee, Plaintiff
vs. Motion.
Scott Litton, Defendant.

This day came the parties, by their attorneys, and the defendant by counsel, filed his demurrer in this case, which demurrer the court overruled, to which ruling of the court the defendant, by counsel, then and excepted and thereupon the defendant filed his plea in writing in this case, and thereupon the plaintiff, by counsel, moved the court to strike out said plea, which motion the Court took under advisement, thereupon, upon motion of the plaintiff this case is continued until the 21st day of February, 1935, and thereupon, upon motion of the defendant P. H. Smith, C. S. Wilson, and M. C. Chaffin witnesses for the defendant, were recognized to appear as witnesses for the defendant in this case, on the 21st day of February, 1935, and the said P. H. Smith, C. S. Wilson and M. C. Chaffin entered into and acknowledged a recognizance in the penalty of $150.00, to be levied of their respective goods and chattels, lands and tenements to the use of the Commonwealth render, conditioned and payable according to law and upon the further condition that the said P. H. Smith, C. S. Wilson, and M. C. Chaffin make their personal appearnaces before the Judge of this court on the 21st day of February,
[237] 1935, to give evidence as witnesses for the defendant in this case, said recognizance to remain in full force and effect until said case is finally disposed of or until declared void by order of a competent court.

Circuit Court of the County of Russell on Fri-
[238] day the 8th day of March, in the year of our Lord, one thousand nine hundred and thirty-five.

Present: The Honorable A. G. Lively, Judge.

P. H. Smith, Trustee, of the Estate in Bankruptcy of Dixie-Splint Coal Company, Incorporated, bankrupt, Plaintiff,
vs. Motion to Quash.
Scott Litton, Defendant.

This case came on to be heard on February 21, 1935,

on plaintiff's written motion to have the judgment therein described declared void and to quash the executions issued thereon, and thereupon the defendant, by counsel, filed his demurrer to said motion, which demurrer the Court overruled, and the defendant, by counsel, then and there excepted, and thereupon the defendant, Scott Litton, filed his plea to said motion, whereupon the plaintiff filed his written motion to strike out said plea, which motion the Court overruled, to which ruling of the court the plaintiff, by counsel, then and there excepted, and thereupon the Dixie Beaver Coal Company, a corporation, tendered and asked leave, to file its petition in this case, to the filing of which the plaintiff, by counsel, objected and which objection the Court sustained and declined to permit said petition to be filed, to which ruling of the Court in refusing to permit the filing of the same, the Petitioner, by counsel then and there excepted, and thereupon the plaintiff replied generally to defendant's plea, and thereupon the court proceeded to hear the evidence of witnesses offered by the plaintiff and the defendant, and counsel for the plaintiff, and for the de-

[239] fendant, respectively, asked for and were given time within which to file briefs in this case, and said case came on this day to be heard upon the pleadings, evidence and briefs of counsel for plaintiff and defendant, as well as upon the brief of counsel for Jean Mc-Neal Pepper, and the Court being of the opinion that the plaintiff is not entitled to the relief prayed for doth refuse to grant the same and doth dismiss this case at the costs of the plaintiff.

[240] CLERK'S CERTIFICATE.

State of Virginia,
County of Russell, to-wit:

I, E. F. Hargis, Clerk of the Circuit Court of the County and State aforesaid, do hereby certify that the foregoing is a correct transcript of the record in the late case of P. H. Smith, Trustee of the Estate in Bankruptcy of Dixie Splint Coal Company, Incorporated, bankrupt vs. Scott Litton, lately pending in said Court, and that before said transcript was made out and deliv-

ered the attorneys for the defendant, Scott Litton, had notice of the transcribing of the same.

Given under my hand this 7th day of May, 1935.

E. F. HARGIS,
Clerk, Circuit Court of Russell County, Virginia.

Fee: $22.10.

A Copy,
Teste:

J. M. KELLY,
Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT WYTHEVILLE.

JUNE TERM, 1936.

JEAN McNEIL PEPPER, Executor, etc.

vs.

HON. FLOYD H. ROBERTS, Judge of Corporation Court of Bristol.

PETITION FOR MANDAMUS.

"The Briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with the Act of Assembly approved March 16th, 1903; and the Clerks of this Court are directed not to receive or file a Brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

J. M. KELLY, *Clerk.*

IN THE

Supreme Court of Appeals of Virginia

AT WYTHEVILLE.

JUNE TERM, 1936.

JEAN McNEIL PEPPER, Executor, etc.

vs.

HON. FLOYD H. ROBERTS, Judge of Corporation Court of Bristol.

PETITION FOR MANDAMUS.

NOTICE OF APPLICATION FOR WRIT OF MANDAMUS.

To the Honorable Floyd H. Roberts, Judge of the Corporation Court for the City of Bristol, Va.

You are hereby notified that on the 2nd day of June, 1936, at 10:00 a. m. of that day, I will make application to the Supreme Court of Appeals of Virginia, at the Court House thereof, at Wytheville, Virginia, for a writ of mandamus on a petition vertified by oath, a copy of

which said petition has heretofore been served on you.

Dated this 18th day of May, 1936.

JEAN McNEIL PEPPER,
Executrix and Sole Devisee of A. Pierce Pepper, deceased.
By Counsel.

H. E. WIDENER,
GEO. M. WARREN,
A. K. MORISON,
Counsel.

A copy of the above mentioned petition for a writ of mandamus was mailed to counsel for Scott Litton, Pauline Jones Litton, Ida L. Farris, Lucy G. Long, Charlotte L. Stewart, Mildred L. Wolfe and C. P. Jones, namely, Henry Roberts, Esquire, of Bristol, Va., and Greever & Gillespie, Esqs., Tazewell, Virginia on the 19th day of May, 1936.

A. K. MORISON,
Counsel for Petitioner.

Executed the within notice by delivering a true copy thereof to Hon. Floyd H. Roberts, Judges of the Corporation Court for the City of Bristol, Virginia, in the City of Bristol, Virginia, on the 18th day of May, 1936, a true copy of the petition for mandamus therein mentioned having been heretofore served on him on the 16th day of May, 1936.

This the 18th day of May, 1936.

WORLEY T. CROSSWHITE,
Sergeant, City of Bristol, Virginia.

NOTICE OF APPLICATION FOR WRIT OF MANDAMUS.

To the Honorable Floyd H. Roberts, Judge of the Corporation Court for the City of Bristol, Va.

You are hereby notified that on the day of June, 1936, at 10:00 a. m. of that day, I will make ap-

plication to the Supreme Court of Appeals of Virginia, at the Court House thereof at Wytheville, Virginia, for a writ of mandamus on a petition verified by oath, a copy of which said petition is served herewith.

Dated this 16th day of May, 1936.

JEAN McNEIL PEPPER,
Executrix and Sole Devisee of A. Pierce Pepper, deceased.
By Counsel.

A. K. MORISON,
H. E. WIDENER,
GEO. M. WARREN,
Counsel.

A copy of the above mentioned petition for a writ of mandamus was mailed to counsel for Scott Litton, Pauline Jones Litton, Ida L. Farris, Lucy G. Long, Charlotte L. Stewart, Mildred L. Wolfe and C. P. Jones, namely, Henry Roberts, Esquire, of Bristol, Va., and Greever & Gillespie, Esqs., Tazewell, Va. on the day of May, 1936.

....., Counsel for Petitioner.

Executed the within notice by delivering a true copy thereof and a true copy of the attached petition to Hon. Floyd H. Roberts, Judge of the Corporation Court for the City of Bristol, Virginia, in the City of Bristol, Virginia on the 16th day of May, 1936. This the 16th day of May, 1936.

WORLEY T. CROSSWHITE,
Sergeant, City of Bristol, Virginia.

Jean McNeil Pepper, Executrix, etc.
vs.
Honorable Floyd H. Roberts, Judge of the Corporation Court for the City of Bristol, Virginia.

PETITION FOR WRIT OF MANDAMUS.

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Your Petitioner, Jean McNeil Pepper, Executrix and Sole Devisee of A. Pierce Pepper, deceased, respectfully represents unto your Honors:

FIRST: That in the suit styled Jean McNeil Pepper, Executrix, etc. v. Dixie Splint Coal Company, et al, of which record it is prayed that your Honors will take judicial knowledge, in which your Petitioner was Appellant and Dixie Splint Coal Company, Scott Litton, Pauline Jones Litton, Ida L. Farris, Lee Long, Lucy G. Long, Charlotte L. Stewart, Mildred L. Wolfe and C. P. Jones were Appellees, there was rendered by your Honorable Court on the 19th day of September, 1935, a decree determining the rights of the parties, awarding costs to your Petitioner and remanding the said cause to the Corporation Court for the City of Bristol, Virginia.

> "with direction that an accounting be had in accordance with the prayer of the Amended and Supplemental Bill and that any damage shown to have been sustained by the Appellant or her decedent, A. P. Pepper, by reason of the failure of the Defendants to mine the premises in accordance with the terms of the lease be ascertained and fixed, and for this purpose, if deemed advisable, the Court should empanel a jury."

A copy of said mandate of your Honorable Court is filed herewith as a part of this petition, and the written opinion of this Honorable Court may be found in Volume 165 of the Official Virginia Reports at page , and in Volume 181 of the Southeastern Reports, at page 406.

SECOND: That your Honorable Court, in its opinion of September 19, 1935, finally adjudicated that said Defendant Appellees, Scott Litton, Pauline Jones Litton, Ida L. Farris, Lee Long, Lucy G. Long, Charlotte L. Stewart and Mildred L. Wolfe and C. P. Jones, were jointly and severally liable to your Petitioner for the

performance of the covenants of a certain lease of coal lands. Said opinion of your Honors is in part as follows:

"The partners forming the co-partnership and the co-partnership itself are also liable for the performance of the covenants of the lease, they having received the assets from the Corporation knowing of its liability under the terms of the lease. The first Dixie Splint Coal Company, its directors and stockholders, the co-partnership and the partners will be treated as the lessees under the lease and will be held accountable for the performance of the covenants in the lease, or for damages for their breach." 165 Va. 181 S. E. p. 411.

That certain provisions of said lease were as follows:

"2. Said Lessors hereby give to said Lessee, its successors and assigns, for and during the term of this lease and subject to all its terms, covenants, provisions and conditions, the exclusive right and privilege to mine, take and remove all of said merchantable marketable coal contained in the said Jaw Bone seam in the above described boundary; and said Lessee, for itself, its successors and assigns, covenants diligently to mine and remove all of said coal in a good, lawful workmanlike manner in compliance with this lease and in accordance with the laws of the State of Virginia and of the United States now in force or that may be hereafter enacted, to the end that there shall be recovered from said stratum the greatest possible tonnage of coal; and the quantity of coal to be recovered from said boundary, as now agreed upon between the parties hereto, shall be not less than eighty-five (85%) per cent of the entire body of the said coal stratum in said boundary.

"3. The said Lessee, for itself, its successors and assigns covenants and agrees to pay to said Lessors as royalty for each and every ton of twenty-two hundred and forty (2240) pounds of coal produced under this lease the sum of fifteen (15) cents royalty, irrespective of the use or disposition made

of said coal by said Lessee, its successors or assigns, with the right to mine and remove from said leased premises during any year of said term as many tons of said coal as may be deserved. But for each and every year of said term or any renewal or extension thereof, or for each and every year that coal may be mined under this lease until said coal is exhausted according to the true intent of the provisions of this lease, not to exceed the term above set out or the renewal or *exension* thereof, (said Lessee, its successors and *asassigns* shall pay to said Lessors at least the sum of three thousand ($3,000.00) Dollars, payable in twelve (12) equal monthly installments of two hundred and fifty ($250.00) dollars per month, even though the royalty on the tonnage of coal actually mined in any year is less than the amount aforesaid; and the said sums of money are agreed upon between the parties hereto as annual rent reserved for said leased premises and as consideration for the rights and privileges conferred by this lease).

"But it is agreed and understood between the parties hereto that the annual minimum royalty above referred to shall not be in force and effect until on and after the first day of January, 1920." (Record, Supreme Court of Appeals, pp. 39 and 40).

That your Honorable Court, with reference to provision No. 2 of said lease, stated as follows in its opinion:

"The Defendants claim that they have exhausted the merchantable coal on the premises, the Trial Court held adversely to the claim, saying that 'the preponderance of the evidence is to the contrary and credible witnesses place the amount still there as exceeding 500,000 tons'. We are in accord with the finding of the Trial Court."

That the Answer and Cross-Bill of Scott Litton (p. 73 of Record in Supreme Court of Appeals) shows that Defendants:

"Did continue to mine coal from the said coal acreage covered by said lease of October 21, 1919, up to and including a part of the year 1928, when all mining on said property ceased and it abandoned said premises."

That "Exhibit A" filed by Scott Litton (page 420 of the Record of the Supreme Court of Appeals) shows the amount of royalties paid annually by the Defendants from the year 1920 through the year 1927 as follows:

1920	$2,665.50,	leaving a balance due of $234.50
1921	127.56,	leaving a balance due of 2872.44
1922		Paid in Full
1923		Paid in full
1924	2,527.89,	leaving a balance due of 472.11
1925	1,974.00,	leaving a balance due of 1026.00
1926		Paid in Full
1927	1,876.92,	leaving a balance due of 1123.08

THIRD: That on the day of , 1935, Counsel for Scott Litton filed before your Honors a Petition for a review of your Honors' decree of September 19, 1935, which Petition was denied by your Honors by decree of November 20, 1935.

FOURTH: Your Petitioner is advised that the only remaining question or issue between your Petitioner and the Defendants upon which there has been no final adjudication is: *How much merchantable coal, in excess of* 500,000 *tons, remains on the leased premises?*

FIFTH: That on the 26th day of November, 1935, your Petitioner filed a petition in the said Corporation Court for the City of Bristol, Virginia, accepting 500,000 tons of merchantable coal as the amount left unmined on the leased premises, and waiving any excess, and asking for a judgment in accordance with the finding and premises of law, decided by this Honorable Court in its aforementioned opinion against Scott Litton, Pauline Jones Litton, Ida L. Farris, Lee Long, Lucy G. Long, Charlotte L. Stewart, C. P. Jones and Mildred L. Wolfe, individually and collectively, as of November 25, 1935 in the amount of $125,151.89. A copy of said Petition is filed herewith and made a part hereof.

SIXTH: That on the 6th day of January, 1936, Counsel for Scott Litton filed a demurrer to said Petition in said Corporation Court, a copy of which is filed herewith, and made a part hereof.

SEVENTH: That on the 20th day of January, 1936, said Corporation Court entered a decree dismissing suit as to Lee Long. A copy of said decree is filed herewith and made a part hereof.

EIGHTH: That on the 12th day of February, 1936, your Petitioner filed a motion to strike said demurrer to her said Petition in said Corporation Court, which motion was denied by said Court, whereupon Petitioner filed a joinder in said demurrer. The said Corporation Court then rendered a decree, setting out rulings and treating Petitioner's Petition as a bill of Particulars to be Amended and Supplemental Bill. Copies of said motion, joinder and decree are filed herewith and made parts hereof.

NINTH: That on the 24th day of April, 1936, having obtained leave so to do, Counsel for Scott Litton filed in said Corporation Court an Amended and Supplemental Answer to Petitioner's Amended and Supplemental Bill of February 8, 1932, whereupon Petitioner filed a motion to strike said Amended and Supplemental Answer, which motion was partly sustained and partly denied. Counsel for Petitioner then, in writing, renewed her motion for judgment on her aforementioned Petition, which motion was denied. Copies of said Amended and Supplemental Answer, motion to strike, motion for judgment and decree entered thereon, are filed herewith and made a part hereof.

TENTH: That the aforementioned pleadings and proceedings are all of said proceedings had in this cause subsequent to said opinion and mandate of this Honorable Court.

Your Petitioner is advised that she has a right to apply to this Honorable Court for a writ of mandamus

to compel the Corporation Court for the City of Bristol, Virginia, to carry out and enforce the decree of this Honorable Court in accordance with the written opinion of Your Honors by entering final judgment in favor of your Petitioner on her Petition asking judgment; wherefore and inasmuch as your Petitioner is otherwise without adequate and sufficient remedy, she prays that a writ of mandamus issue to compel said Corporation Court for the City of Bristol, Virginia to carry out the decree of September 19, 1935, in accordance with the written opinion of your Honors by entering judgment in favor of the Petitioner and against the Defendants Scott Litton, Pauline Jones Litton, Ida L. Farris, Lucy G. Long, Charlotte L. Stewart, Mildred L. Wolfe and C. P. Jones on the petition of your Petitioner, filed in said Corporation Court on the 25th day of November 1935; and, that your Honors will grant unto your Petitioner such other, further and general relief as the nature of her case may require.

JEAN McNEIL PEPPER,
Petitioner.

GEO. M. WARREN,
A. K. MORISON,
H. E. WIDENER,
Counsel for Petitioner.

State of Virginia,
City of Bristol, to-wit:

This day, Jean McNeil Pepper, the above named Petitioner, personally appeared before me, Martha C. Smith, a Notary Public, in and for the City and State aforesaid in my City aforesaid, and made oath that the matters and things stated in the foregoing Petition are true.

Given under my hand this 15 day of May, 1936.

My Commission expires on the 9th day of August, 1936.

MARTHA C. SMITH,
Notary Public.

Virginia:

In the Supreme Court of Appeals, held at the Court House thereof in the City of Staunton on Thursday the 19th day of September, 1935.

Jean McNeil Pepper, Executrix, etc., Appellant,
against
Dixie Splint Coal Company and others, Appellees.

Upon an Appeal from a Decree by the Corporation Court of the City of Bristol on the 19th day of February, 1934.

This cause which is pending in this court of its place of session at Wytheville having been fully heard but not determined at said place of session, this day came here the parties by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments filed with the record, that the said decree is erroneous. It is therefore adjudged, ordered and decreed that the same be, and is hereby reversed and annulled, and the cause remanded to the said Corporation Court with direction that an accounting be had in accordance with the prayer of the amended and supplemental bill, and that any damages shown to have been sustained by the appellant or her decedent, A. P. Pepper, by reason of the failure of the defendants to mine the premises in accordance with the terms of the lease, be ascertained and fixed, and for this purpose, if deemed advisable, the Court should empanel a jury.

It is further adjudged, ordered and decreed that the appellant recover against the appellees her costs by her expended about the prosecution of her appeal aforesaid herein.

Virginia:

In the Corporation Court of the City of Bristol.

Jean McNeil Pepper, Administratrix, etc., Complainant,
vs. () In Chancery.
Dixie Splint Coal Company, et al, Defendant.

PETITION

To the Honorable Floyd H. Roberts, Judge of said Court:

Petitioner, Jean McNeil Pepper, Administratrix and sole devisee of A. P. Pepper, deceased, respectfully shows:

I.

That following the final decree of this Court in this cause, made February 19, 1934, and, in due course, Petitioner appealed from said decree as to the "First" Dixie Splint Coal Company, a corporation, and the "Second" Dixie Splint Coal Company, a co-partnership, and the members of the said co-partnership individually, to the Supreme Court of Appeals of Virginia, to determine the liability of said "First Dixie Splint Coal Company, a co-partnership, and the individual members of said co-partnership, to this Petitioner.

II.

Petitioner's appeal to the Supreme Court of Appeals of Virginia was duly granted, and in due course, heard, and, on September 19, 1935, the said Court in deciding said appeal, in substance, said:

"The first Dixie Splint Coal Company, its directors and stockholders, the co-partnership and the partners will be treated as the lessees under the lease and will be held accountable for the performance of the covenants in the lease or for damages for their breach." (Opinion p. 16.)

A copy of the opinion of said Court, is, for the convenience of the Court appended to this Petition, as a part hereof, marked "Exhibit Opinion".

III.

Petitioner shows that her Amended and Supplemental Bill of Complaint, in this cause, was predicated upon two propositions:

First, that the directors and stockholders of the "First" Dixie Splint Coal Company, were liable to Petitioner under *Secions* 3810 and 3840 of the Virginia Code, for all dividends and distributions of capital declared by said directors, and or, received by such stockholders.

Petitioner accordingly alleged that an accounting was necessary to determine and fix the amount of dividends and capital distributions declared or made by said directors, and, received by said stockholders, in order that the liability of each of such directors and stockholders could be determined and each of the said directors and stockholders held liable to Petitioner for the sums of money declared by, and or, received by them from said Corporation, both as dividends and capital distributions.

Second, the said Amended and Supplemental Bill was predicated on another proposition namely, that the actual ownership of all of the properties of the "First" Dixie Splint Coal Company, a co-partnership, belonged to, and was vested in Scott Litton, Lee Long, and members of their families; and, that a Court of Equity would, disregarding the fictions and forms of ownership, ascertain and determine the real parties in interest, and, hold them individually, and collectively, liable to this Petitioner.

Petitioner shows that the Supreme Court of Appeals of Virginia, in determining this proposition, held:

"The same mine was operated under the same lease by the same parties. The same parties owned the entire businss of the three companies." (Decision p. 10)

"The form changed but the real parties in interest always remained the same." (Decision p. 11)

"The partners forming the co-partnership and the co-partnership itself are also liable for the performance of the covenants of the lease, they having received the assets from the Corporation knowing of its liability under the terms of the lease. The first Dixie Splint Coal Company, its directors and stockholders, and the co-partnership and the partners will be treated as the lessees under the lease and will be held accountable for the performance of the covenants in the lease, or for damages for their breach." (Decison p. 16)

IV.

Petitioner shows, that in view of the decision of the said Supreme Court of Appeals of Virginia, deciding that the stockholders and directors of the "First" Dixie Splint Coal Company, and the individual members of the co-partnership composing the "Second" Dixie Splint Coal Company, are one and the same, it is not now necessary to determine the amount of dividends and capital distribution made by the directors of the "First" Dixie Splint Coal Company, and received by the stockholders of said Company, inasmuch as the same individuals, as co-partners, are individually liable to Petitioner, under the terms of said decision.

Petitioner further shows, in view of the decision of said Supreme Court of Appeals, holding the said individuals liable to Petitioner, that an accounting of the dividends and capital distribution made and received, is not now necessary, inasmuch as the liability of such individuals, either as directors, and or stockholders, is not longer limited to the amount of dividends and capital distributions made by the said directors, and or, received by the said stockholders of the "First" Dixie Splint Coal Company. Petitioner shows, that said co-partners are now individually liable to her for the payment of the full amount she is entitled to recover in this cause.

V.

Petitioner further shows that this Court, in its opinion in this case (R. 474) said:

"Another defense relied upon is that defendant corporation has exhausted the merchantable coal covered by the lease. The preponderance of the evidence is to the contrary and creditable witnesses place the amount still there as exceeding five hundred thousand tons."

The Supreme Court of Appeals affirmed the finding of this Court, and in its decision in this case said:

"The defendants claim that they have exhausted the merchantable coal on the premises, but the trial court held adversely to this claim, saying that 'the preponderance of the evidence is to the contrary and creditable witnesses place the amount still there as exceeding five hundred thousand tons'. We are in accord with this finding of the trial court." (Decision p. 17).

The Petitioner shows that she is willing to accept five hundred thousand (500,000) tons of unmined merchantable coal now remaining upon the leasehold, as the quantity of coal which the defendants abandoned, and, which they were obligated to mine under the terms of said Lease Agreement.

Petitioner shows that the measure of damages to which she is entitled for said quantity of unmined coal is fixed by the Lease Agreement at fifteen (15 cts.) per ton.

Petitioner further shows that according to the Answer and Cross-Bill of Scott Litton (R. 73) that defendants:

"Did continue to mine coal from the said coal acreage covered by said lease of October 21, 1919, up to and including a part of the year 1928, when all mining on said property ceased and it abandoned said premises.

Petitioner shows, therefore, that in addition to the liquidated damages of fifteen (15 cts) cents per ton for five hundred thousand (500,000) tons of unmined merchantable coal remaining upon the leasehold premises, she is entitled to interest on the total amount from 1928, until paid; and, Petitioner here states that she is willing that interest on said sum be computed from February 1, 1928, until paid.

VI.

Petitioner further shows that the defendants are liable under the said decision of the Supreme Court of Appeals, for the performance of all the covenants contained in the Lease Agreement of October 21, 1919, and damages for the breach thereof; and, that under Section 3 of said Lease Agreement (R. p. 39) the Lessees agreed and covenanted to pay the Lessor annually:

"At least three thousand ($3,000.00) Dollars, payable in twelve (12) monthly instalments of Two Hundred and Fifty ($250.00) Dollars per month, even though the royalty on the tonnage of coal actually mined in any year is less than the amount aforesaid," etc.

Petitioner states that she is willing to have the annual royalties due her computed and ascertained as of the 31st day of December in each year; and, Petitioner shows that she is entitled to judgment against the Defendants according to "Exhibit A" filed by Scott Litton (R. 420) for the year 1920 to and including the year 1927, for the difference between the total amount of monthly per ton royalties paid to her in each such year, and, the sum of Three Thousand ($3,000.00) Dollars, with interest thereon, from the end of each said year, until paid.

In view of the premises, Petitioner prays, that she be decreed judgments, individually, and collectively, against Scott Litton, Pauline Jones Litton, C. P. Jones, Ida L. Farris, Lee Long, Lucy G. Long, Charlotte L. Stewart and Mildred L. Wolfe, for the following sums of money, namely:

500,000 tons of unmined coal @ 15 cts. per ton	$75,000.00
Interest from February 1, 1928 (R. 420) to November 1, 1935; namely 8 years and 9 months	39,375.00
	114,375.00

For Annual Minimum Royalty, Balance due as follows:

Year	Royalty	Am. Paid	Bal. Due	Int. to Nov. 1, 1935	Total Due Nov. 1, 1935
1920	$3,000.00	$2,665.50	$ 334.50	$ 301.38	$ 635.88
1921	3,000.00	127.56	2,872.44	2,675.06	5,547.50
1922	3,000.00	Pd. in full	-0-	-0-	-0-
1923	3,000.00	Pd. in full	-0-	-0-	-0-
1924	3,000.00	2,527.89	472.11	335.23	807.34
1925	3,000.00	1,974.00	1,026.00	666.90	1,692.90
1926	3,000.00	Pd. in full	-0-	-0-	-0-
1927	3,000.00	1,876.92	1,123.09	595.19	1,718.27
					$10,401.89
Total Amount Due Nov. 1, 1935					125,151.89

And in addition thereto, Petitioner prays judgment for her costs in this behalf expended.

Petitioner also prays for such other, further and general relief, not herein specifically prayed for, but which is suited to her cause, and which, to a Court of Equity, seemeth right and proper; and, in duty bound, Petitioner will ever pray, etc.

JEAN McNEIL PEPPER,
Administratix and Sole Devisee of
A. P. Pepper, deceased.

H. E. WIDENER,
A. K. MORISON.

State of Virginia,
City of Bristol, to-wit:

I, Martha C. Smith, a Notary Public for the City of Bristol, and State of Virginia, hereby certify that Jean McNeil Pepper this day made oath before me, in my City and State aforesaid, that the facts stated in the foregoing Petition are true, and, that the facts stated on information and belief, she believes to be true.

Given under my hand this the 25th day of November, 1935.

MARTHA C. SMITH,
Notary Public.

My commission expires Aug. 9, 1936.

Legal service of the within Petition accepted this 14 day of December, 1935.

JOHN W. FLANNAGAN, JR.,
Of counsel of record for the Defendants, Scott Litton, Pauline Jones Litton, C. P. Jones, Ida L. Farris, Charlotte L. Stewart, Mildred L. Wolfe, Lee Long and Lucy G. Long.

Jean McNeil Pepper, etc.
vs.
Dixie Splint Coal Co., etc.

On motion of defendants, they are allowed to file their demurrer to the petition of Complainant herein.

Virginia:

In the Corporation Court of the City of Bristol.

Jean McNeil Pepper, Administratrix, etc., Complainant,
vs. In Chancery.
Dixie Splint Coal Company, et al, Defendants.

DEMURRER.

To the Honorable Floyd H. Roberts, Judge of said Court:

Come now Pauline Jones Litton, Ida L. Farris, C. P. Jones, Scott Litton, Lucy G. Long, Charlotte L. Stewart, Mildred Wolfe, and Lee Long, respondents in a petition filed herein against them by Jean McNeil Pepper, Administratrix and sole devisee of A. P. Pepper, on November 26, 1935, and say that said petition is not sufficient in law, and for grounds of demurrer show unto the Court:

I

PREFACE.

Defendants are advised that the only question at issue in the appeal to the Supreme Court of Appeals, and the only question decided by that Court, was that of the liability of defendants to complainant.

The assignments of error in the Petition for Appeal were expressly and solely directed to the question of the liability of defendants to complainant. The petition for appeal, and the opinion of the Supreme Court, state that complainant accepts the judgment for $9,000.00 and interest, against the third Dixie Splint Coal Company.

The entire opinion, including that part of it referring to the quantity of coal remaining on the premises, is directed to the consideration of the question of liability of defendants to complainant, and, as stated in the petition now filed by Complainant, the Supreme Court of Appeals held:

"The first Dixie Splint Coal Company, its directors and stockholders, the co-partnership and the partners will be treated as the lessees under the lease and will be held accountable for the performance of the covenants in the lease or for damages for the breach."

The opinion concludes with the statement that "the decree is reversed and the cause remanded to the lower Court," and the decree, after reciting that the appeal is from a decree of the Corporation Court rendered February 19, 1934, and after referring to the opinion of the Supreme Court of Appeals, states that, "it is therefore adjudged, ordered and decreed that the same be, and is hereby reversed and annulled, and the cause remanded to the Corporation Court", and both the opinion and decree conclude:

"with direction that an accounting be had in accordance with the prayer of the amended and supplemental bill, and that any damages shown to have been sustained by the appellant, or her decedent, A. P. Pepper, by reason of the failure of the defendants to mine

the premises in accordanc with the terms of the lease, be ascertained and fixed, and for this purpose, if deemed advisable, the Court should impanel a jury."

II.

GROUNDS OF DEFENSE.

1. The cause of action and every part thereof, asserted in the original and amended and supplemental bills, were merged in the final decree of this Court rendered February 19, 1934, which judgment was accepted by complainant, the issues involved in the cause are therefore res judicata, and said final decree is a bar to further proceedings herein on said cause of action, and on every part thereof.

2. The measure of damages for the alleged breaches of the contract in controversy was fixed by said final decree at $9,000.00 and the interest thereon, and the complainant cannot recover from these respondents more than said sum of $9,000.00 and the interest thereon.

3. The only issue involved in the appeal to the Supreme Court of Appeals, as set out in assignments of error in the Petition for Appeal to said Court, was the question of respondents liability for said judgment of $9,000 and interest thereon—after giving proper legal effect to said judgment, and the acceptance thereof by complainant—and the effect of the decision of the Supreme Court of Appeals is to render respondents severally liable for said judgment of $9,000, and the interest thereon, and no further.

4. Since complainant claims that respondents, as co-partners, assumed the liabilities of the first Dixie Splint Coal Company under the lease in controversy, and that the third Dixie Splint Coal Company assumed the liabilities of both of the former companies, but that said assumptions did not release the *preceeding* company or companies, the legal effect of accepting said judgment was to discharge the liabilities of the two preceding companies in excess of the judgment for $9,000, and interest, for the reason that complainant thereby released the last company from all claims and liability in

excess of that amount, and the other companies are thereby deprived of any recourse on the third company in excess of said judgment, under the assumption by it of said liabilities. Having released the third company from further liability by accepting the judgment of $9,000.00 and interest, and having deprived respondents of their right of holding the third company liable, in excess of judgment, complainant is, therefore, estopped, as a matter of law, from asserting, and has waived, any claim in excess of said judgment for $9,000.00 and interest against these respondents.

5. If respondents be in error in the position taken in the foregoing grounds of demurrer, then said judgment for $9,000.00 and interest is excluded from consideration as a part of the alleged damages—in fact, the petition does not assert that said judgment should be considered as a part of the alleged damages—and, in other respects, the opinion and decree of the Supreme Court of Appeals leaves the question of damages, if any, open for assertainment as directed by said decree, and not as set out in the petition.

The claims asserted in the petition relative to damages are inconsistent with and in conflict with the record in the case, the acceptance by Complainant of the judgment for $9,000.00 and interest, and the opinion and decree of the Supreme Court of Appeals.

Also, the letter on page 423 of the printed record shows that Complainant agreed to a reduction of five cents per ton of the royalty on the coal to be mined after July 19, 1926, under the conditions therein named.

Also, the damages for not mining the coal are not to be determined on the basis of the 15 cts., or 10 cts., per ton, as complainant still has the coal, and the value thereof is to be considered.

6. The answer of George H. Pepper filed in the case, and his deposition, preclude Complainant from any recovery against respondents on account of the interest of George H. Pepper in the premises and the lease.

7. There is no equity in the petition.

For which reasons, and others to be assigned at the hearing, respondents say that said petition is not sufficient in law, and pray that same may be dismissed.

PAULINE JONES LITTON,
IDA L. FARRIS,
C. P. JONES,
SCOTT LITTON,
LUCY G. LONG,
CHARLOTTE L. STEWART,
MILDRED WOLFE,
LEE LONG,
By HENRY ROBERTS,
GREEVER & GILLESPIE,
JOHN W. FLANNAGAN, JR.,
Counsel.

Filed by order of Court January 6, 1926.

DAN DRINKARD,
Clerk.

In the Corporation Court for the City of Bristol, Virginia.

Jean McNeil Pepper, Executrix and Sole Devisee of A. P. Pepper, deceased
vs. () DECREE.
Dixie Splint Coal Company, Scott Litton, Pauline Jones Litton, Lee Long, Lucy G. Long, Charlotte L. Stewart and Mildred L. Wolfe.

This cause came on to be heard on the Special Plea and Motion of the defendant, Lee Long, and was argued by Counsel, and the Court being of the opinion that the defendant, Lee Long, has been discharged from any liability to the plaintiff in this cause by the District Court of the United States for the Western District of Virginia, at Big Stone Gap, Virginia, sitting in bankruptcy, on the 11th day of May, 1933, doth order, adjudge and

decree that as to the defendant, Lee Long, the said case be, and the same is hereby DISMISSED.

Enter this decree.

1/20/36. FLOYD H. ROBERTS,
Judge.

In the Corporation Court for the City of Bristol, Virginia.

MOTION TO STRIKE DEFENDANTS' DEMURRER TO COMPLAINANT'S PETITION.

Jean McNeil Pepper, Executrix and Sole Devisee of A. P. Pepper, deceased
vs.
Scott Litton, et al

Comes now the Complainant by counsel and moves the Court to strike from the record in this cause the Demurrer of the Defendants to Complainant's Petition filed herein on the day of December, 1935, for the following reasons:

FIRST: The several grounds of the Demurrer are actually one and the same, to-wit:

That Complainant by accepting judgment against the third Dixie Splint Coal Company, for $9,000.00, thereby released the two preceding companies, of the same name, from all liabilities.

SECOND: This same question was brought to the attention of the Supreme Court of Appeals by Complainant's Petition for Appeal; and, was necessarily considered and disposed of by said Court when it granted an appeal in this cause.

See Record II "The Appeal" page 6.

THIRD: The Defendants by their Petition For Rehearing to the Supreme Court of Appeals of Virginia brought this same contention a second time to the attention of said Court (Petition for Rehearing, page 6) and,

the said Court denied such rehearing, again necessarily holding that the contention was without merit.

FOURTH: By their Demurrrer Defendants seek to have this Court revise and reverse the decision of the Supreme Court of Appeals, which, of course, this Court has no power to do.

Respectfully submitted,

JEAN McNEIL PEPPER,
By Counsel.

GEORGE M. WARREN,
A. K. MORISON,
Counsel.

In the Corporation Court for the City of Bristol, Va.

Jean McNeil Pepper, Executrix and Sole Devisee of
A. P. Pepper, deceased
vs. () Joinder in Demurrer.
Scott Litton, et al

Comes now the Complainant by counsel, and without waiving her motion to strike Defendants' Demurrer heretofore filed herein, says that her Petition is sufficient in law.

JEAN McNEIL PEPPER,
By Counsel.

A. K. MORISON,
GEO. M. WARREN,
Counsel

February 12, 1936

A. P. Pepper
vs.
Dixie Splint Coal Company, et al.

This cause came on this day to be heard upon the papers formerly read, and decrees entered, and particularly upon the petition of Jean McNeil Pepper, Executrix and sole devisee of A. P. Pepper, deceased, filed herein on November 26, 1935, the demurrer thereto in

writing, filed January 6, 1936, of Pauline Jones Litton, Ida L. Farris, C. P. Jones, Scott Litton, Lucy G. Long, Charlotte L. Stewart, Mildred Wolfe and Lee Long, the motion in writing of Jean McNeil Pepper to strike from the record in this cause, the said demurrer, which motion to strike after argument, the Court doth deny; and thereupon, the said Jean McNeil Pepper filed a joinder in said demurrer, which demurrer and joinder thereon were argued by counsel; upon consideration whereof the Court is of the opinion that said demurrer should be over-ruled, and doth so adjudge, and the Court is further of opinion that said petition should be treated as in the nature of a bill of particulars under the amended and supplemental bill of complaint heretofore filed herein, and doth so adjudge. The defendants except to the ruling of the court in over-ruling the demurrer. Complainant excepts to the action of the court in denying the motion to strike.

In the Corporation Court of the City of Bristol, Virginia:

Jean McNeil Pepper, Executrix, etc., Complainant,
vs.
Dixie Splint Coal Company, et als, Defendants.

AMENDED AND SUPPLEMENTAL ANSWER OF SCOTT LITTON.

To the Honorable Floyd H. Roberts, Judge of said Court:

Comes now Scott Litton, one of the defendants in this cause, and asks leave to file this amended and supplemental answer herein to the bill and amended and supplemental bill heretofore filed against him and others by Jean McNeil Pepper, Executrix, etc., and referring to and relying upon his answers heretofore filed herein, and in addition thereto, shows unto the Court:

1. That under date of September 23, 1923, Respondent loaned to A. W. Taylor and Geo. H. Pepper, one of the parties to this cause and one of the parties to the lease contract in controversy, the sum of $10,000.00, as

is evidenced by the original note filed herewith as Exhibit Note No. 1.

That said note was renewed by said parties from time to time until about the year 1926, when it was divided, (each of said parties having received the benefit of one-half thereof), and said parties gave Respondent their separate notes for $5,000.00 each, and that thereafter said Geo. H. Pepper renewed his separate note to Respondent for $5,000.00, until January 30, 1931, which last renewal, and a letter from Geo. H. Pepper transmitting same to Respondent, are filed herewith as Exhibit Note No. 1a, and Exhibit Geo. H. Pepper letter No. 1.

Said debt was due Respondent by said Geo. H. Pepper from the date of said first mentioned note until now, and is still due, and said notes were past due, from time to time, until renewed, and the interest is due thereon and unpaid for some years prior to the last renewal, as is evidenced by letters from said Geo. H. Pepper to Respondent dated June 5, and Oct. 19, 1929, filed herewith as Exhibits Geo. H. Pepper Letters No. 1a and 1b.

2. That on, or some time prior to, March 5, 1924, Respondent, and A. W. Taylor, and Geo. H. Pepper, endorsed a note of Lake George Shell Corporation, for $5,000.00, payable to the order of the Dickenson County Bank, which note was also endorsed by C. W. Perkins. Said note was renewed at intervals of a few months, from time to time, until it was reduced or curtailed by the maker thereof, during 1930 and 1931, to $4500.00.

When said note was originally endorsed, and renewed from time to time, it was understood between said A. W. Taylor, Geo. H. Pepper and Respondent, that they were to each be liable for one-third thereof, as between themselves.

Said note, as reduced to $4500.00, was finally paid by Respondent during the year 1931, the maker thereof having become insolvent, and the holder of the note requiring Respondent to pay the same, and said Geo. H. Pepper is due and owes Respondent one-third thereof, or $1500.00, with interest thereon from April 2, 1931, and *attorneys* fees thereon provided for in the note.

Because of the absence of said Geo. H. Pepper, particularly during the later years when said note was renewed, and after he became insolvent, said renewal note was not always endorsed by said Geo. H. Pepper, but

his failure to endorse the same did not relieve him of his liability for one-third thereof.

Only a comparatively small number of said renewal notes are now available. What seems to be the original note, dated March 5, 1924, for $5000.00, endorsed by all of said parties; and a renewal dated October 10, 1928, for $5000.00, endorsed by Geo. H. Pepper, A. W. Taylor, and Respondent; and the last renewal thereof for $4500.00, dated Jan. 2, 1931, endorsed by Taylor, Perkins and Respondent, due April 2, 1931, and which was thereafter paid by Respondent, are filed herewith as Exhibit Note No. 2, 2a and 2b. Said Geo. H. Pepper endorsed some of said renewals after Oct. 10, 1928, but the renewals are not in hand now. Evidence thereof will be presented at the hearing, if necessary or required.

3. Respondent avers that at the time the lease in controversy was made, in October, 1919, said Geo. H. Pepper resided at Norton, Virginia, and was then and for a number of years thereafter interested in and actively engaged in coal mining operation in Wise County, Va.; that said Geo. H. Pepepr was a practical coal operator, and that A. P. Pepper relied upon him and left matters largely to him about the lease during the operations under the lease; that Geo. H. Pepper represented himself and A. P. Pepper in negotiating the lease, and in making the inspections on behalf of the Lessors, from time to time, as provided by section 5 of the lease, and did make such inspections and examinations; while the reports and remittances, for the Lessors, were made by the Lessee to A. P. Pepper, at Bristol, Virginia, as provided by the lease.

4. Respondent avers that when said $10,000.00 loan was made to A. W. Taylor and Geo. H. Pepper ($5,000.00 thereof being primarily a loan to Geo. H. Pepper), and when Respondent became the joint endorser on said $5,000 note of Lake George Shell Corporation with said Geo. H. Pepper and A. W. Taylor, and with said agreement that they were to be equally liable therefor, and when said notes were renewed, from time to time, Respondent was largely interested in Dixie Splint Coal Company, the Lessee, and in active charge of its business and operations; and, as heretofore asserted in this cause, Respondent understood, and Geo. H. Pepper, rep-

resenting himself and A. P. Pepper, understood (as is shown by the facts set out herein, the exhibits filed herewith, and the answer and depositions of Geo. H. Pepper in this cause) that the lease involved in this controversy only required the Lessee to pay the Lessors the earned royalties under the lease, and under the letter of July 12, 1926, modifying the lease, (See printed record page 423), and did not require the payment of any minimum royalty, or the payment of any royalty during such periods as the coal on the leased premises was not merchantable, and that the Lessee had fully performed, and was fully performing, all obligations of the lease from month to month, and year to year.

5. During the year 1921, no royalties were paid under said lease except $127.56, and Respondent avers that about the middle of that year said Geo. H. Pepper, representing himself and A. P. Pepper, came to the mine at Clinchfield, and raised the question of the minimum royalty under the lease, and that he and P. H. Smith, Secretary of Dixie Splint Coal, read the lease through, and agreed that the words "other agencies beyond the control of said Lessee", in connection with the other provisions of the lease, applied to and covered periods during which the coal on the Pepper tract was not merchantable, and exempted the Lessee from paying the minimum royalty during such periods, and that no claim was thereafter made for any minimum royalties under the lease by the Lessors.

During the year 1925. the royalties for January and February were only $128.77 and $25.04, respectively, and no coal was mined and no royalties paid for or during the months of March, April, May, June and July of that year, and only $111.87 for August, which was paid about Sept. 20, 1925, and Respondent avers that, with the knowledge of these facts in the minds of all the parties, as evidenced by the discussion relative to an advance, said Geo. H. Pepper and A. P. Pepper came to Clinchfield during the early Fall of 1925, and requested said Lessees, through this Respondent, to advance them the sum of $1500.00 on account of royalties to be earned in the future.

During the discussion about the request for the advance, Respondent mentioned to A. P. Pepper the fact that he had made the loan of $5,000.00 to Geo. H. Pepper,

and that it was still unpaid, which fact A. P. Pepper had known for some time, if not from the time the loan was made, and said A. P. Pepper also knew of the endorsements of the Lake George Shell Corporation note for $5,000.00, and the liability of the endorsers therefor, and he inquired of Respondent from time to time as to how the Lake George Shell Corporation was getting along. And any question about minimum royalties was not only not raised, but was positively negatived by the discussion on the fact that Geo. H. Pepper owed Respondent the $5,000.00, and by the request for the advance of $1500.00 against royalties to be earned in the future.

However, the coal business had then recently improved greatly, and large shipments were being made, and in the spirit of friendly co-operation which had always existed between the parties, the advance of $1500.00 was made, and charged against royalties to be earned in the future, and such advance was repaid by the earned royalties for September, October and November, 1929, as appears from the letters of Dixie Splint Coal Co. to A. P. & Geo. H. Pepper, dated Oct. 20, Nov. 20, and Dec. 23, 1925, filed as a part of "Exhibit Monthly Statements of Dixie Splint Coal Co. filed with deposition of A. P. Pepper June 28, 1932", which letters are referred to and made a part hereof, and copies thereof are attached hereto as Exhibits Letters of Oct. 20, Nov. 20 and Dec. 23, 1925.

Then, on July 12, 1926, with all the foregoing facts in the minds of the parties, including A. P. Pepper, as evidenced by their actions and conversations, the earned royalty was reduced from 15 cts. to 10 cts. per ton on the terms stated in the letters exchanged between the parties on that date (see printed record page 423), and while said Pepper letter is dated at Bristol, it was actually written and delivered at Clinchfield.

The total royalties paid during 1925 were about $1974.00 and during 1927 about $1876.92, without objection or complaint. Then, from February, 1928, to October, 1930, no coal was mined and no royalty paid, because the coal on the Pepper property was not merchantable during that period, and A. P. Pepper made no claim or complaint whatever until the letter of October 8, 1930, was written by Mr. Patterson for him.

6. Respondent avers that by reason of some of the

foregoing facts, said A. P. Pepper had personal knowledge of the fact that the Lessee and Geo. H. Pepper understood the lease to provide that no minimum or other royalty was to be paid when the Pepper coal was not merchantable; that all the parties understood that no minimum royalty was to be paid at any time; that some of the foregoing facts show that A. P. Pepper so understood the lease; and that by reason of all the foregoing facts, said A. P. Pepper was charged with notice and bound by notice that his representative and joint owner, Geo. H. Pepper, and the Lessee, so understood the lease.

And Respondent also avers that said A. P. Pepper was charged with notice of such interpretation of the lease by receiving the monthly reports and settlements through all the years, without question or objection, and that such actions show that A. P. Pepper so interpreted the lease.

7. Respondent avers that by reason of the foregoing facts he was induced to make said loan to Geo. H. Pepper, and to endorse said note with him upon said agreement as to their respective liability therefor, and to renew said notes from time to time, and that he would not have made said loan or evidenced said note, or renewed said notes, if he had known that A. P. Pepper would ever attempt to place a different construction upon said lease than that placed upon same by Respondent and by the Lessee, and by Geo. H. Pepper representing himself and A. P. Pepper, and by said A. P. Pepper, for more than ten years.

Respondent avers that if any question had been raised before he made said loan, or endorsed said note, he would not have made the loan or endorsed the note; and if such question had been raised after the loan was made, and the note endorsed, he would have taken steps to protect himself before said Geo. H. Pepper conveyed his interest in the leased property to A. P. Pepper on April 20, 1927, and before Geo. H. Pepper became insolvent.

8. Respondent avers that said Geo. H. Pepper became insolvent while said loans were being renewed, and after conveying his interest in said property to A. P. Pepper, or about that time.

Said Geo. H. Pepper became a non-resident of Virginia prior to the date of his deed to A. P. Pepper of April 20, 1927, residing first at Johnson City, Tennessee, and later at Knoxville, Tennessee, and continued a non-resident of Virginia until his death, and he died about the time A. P. Pepper died, insolvent, and leaving no appreciable assets.

8½. By the decision of the Supreme Court of Appeals, Respondent has been held to be one of the Lessees under the lease in controversy. Therefore

9. Therefore, by reason of the foregoing facts and premises:

(a) Respondent asserts and pleads said note for $5,000.00, the interest thereon from the date to which interest was paid, and the attorneys fees provided for herein, and said $1500.00 of said endorsed note, with interest thereon from April 2, 1931, and the attorneys fees provided for in said note, as set-offs against the claim for damages for breach of said lease contract asserted by Complainant, in so far as Complainant sserts, or attempts to assert, any claim or claims for damages for breach of said lease contract out of, on account of, the interest of said Geo. H. Pepper in said lease contract.

(b) Respondent pleads said facts and premises as an estoppel against Complainant's claim for damages for breach of said lease contract, both as to the interest of said Geo. H. Pepper and the interest of A. P. Pepper, and of Complainant, under the lease contract in controversy.

And Respondent prays to be hence dismissed, etc.

SCOTT LITTON.
By HENRY ROBERTS,
JOHN W. FLANNAGAN, JR.,
Counsel.

EXHIBIT LETTER OF DEC. 23, 1925.

December 23, 1925

Messrs. A. P. and Geo. H. Pepper,
Bristol, Va.-Tenn.

Gentlemen:

We list below statement of coal mined and removed by us from your property during the month of November 1925, at our No. 1 Mine, and showing the amount of royalty due thereon, with which we have credited your royalty account, as per previous agreement with our Mr. Litton.

We have computed the royalty as follows:

Total tonnage No. 1 Mine	4117 Bank Cars	16359.300 No.	
Less mined from Pepper property	1759 Bank Cars	6989.558 No.	3120-338 LT
3120-338 L T @ 15 cts.			$468.04
We credit your royalty account			468.04

Yours very truly,

DIXIE SPLINT COAL COMPANY,
By P. H. SMITH.

ENC. This clears out the $1500.00 advance by fifty five cents. You will find our check attached covering.

EXHIBIT LETTER OF NOV. 20, 1925

November 20, 1925

Messrs. A. P. & Geo. H. Pepper,
Bristol, Va-Tenn.

Gentlemen:

We list below statement of coal mined and removed by us from your property during the month of October, 1925, at our No. 1 mine, and showing the amount of royalty due thereon, with which we have credited your roy-

alty account, as per previous agreement with our Mr. Litton.

We have computed the royalty as follows:

Total tonnage No. 1 Mine 3973 Bank Cars 15,777.50 No.
Less mined from Pepper
Property 2060 Bank Cars 8,180.632 No.
3652-06 LT

3652-06 L T @ 15 cts. $548.80
We credit your royalty account 548.80

Yours very truly,

DIXIE SPLINT COAL COMPANY,
By P. H. SMITH,

ENC.

EXHIBIT LETTER OF OCT. 20, 1925.

October 20th, 1925.

Messrs. A. P. & Geo. H. Pepper,
Bristol, Va.-Tenn.

Gentlemen:

We list below statement of coal mined and removed by us from your property during the month of September, 1925, at our No. 1 Mine, and showing the amount of royalty due thereon, with which we have credited your royalty account, as per previous agreement with our Mr. Litton:

We have computed the royalty as follows:

Total tonnage No. 1 Mine
3546 Bank Cars 14,595,000 No.
Less mined Pepper Property
1755 Bank cars 7,223,426 No. 3224.
743 LT.

3224-743 Long Tons @ 15 cts. $483.71
We credit your royalty account 483.71

Yours very truly,

DIXIE SPLINT COAL COMPANY,
By P. H. SMITH,

EXHIBIT NOTE NO. 2b.

$4500.00 Dante, Va. Jan. 2nd, 1931

Three Months after date for value received we promise to pay to the order of The Dickenson County Bank Forty Five Hundred and no/100 Dollars at the Dickenson County Bank, Dante, Virginia.

The undersigned principal and endorsers of this note waive demand, notice and protest thereof, and we agree that if this note is placed in the hands of an attorney at law for collection, or has to be sued on, that we will pay ten per cent attorney's fees in addition to the principal and interest, which fee shall be added to and become a part of the judgment.

LAKE GEORGE SHELL CORP.,
By A. W. TAYLOR,
Sec. and Tr.

No. 8788 Due Apr. 2, 1931

We as endorsers, waive demand, notice and protest, guarantee payment of this note, and acknowledge that we sign with full knowledge of this contract.

A. W. TAYLOR,
C. M. PERKINS,
SCOTT LITTON.

For value Received the within note is assigned, without recourse, to order of Scott Litton.

CUMBERLAND BANK AND TRUST CO.,
Receiver for Dickenson County Bank,
By R. S. SUTHERLAND,
Vice-Pres.

8-27-31 paid by Scott Litton $1000.00.

EXHIBIT NOTE NO. 2a.

$5000.00 Dante, Va., Oct. 10th, 1928.

Ninety days after date for value received We promise to pay to the order of the Dickenson County Bank Five

Thousand and no/100 Dollars at the Dickenson County Bank, Dante, Virginia.

The undersigned principal and endorsers of this note waive demand, notice and protest thereof, and we agree that if this note is placed in the hands of an attorney at law for collection, or has to be sued on, that we will pay ten per cent attorneys' fees in addition to the principal and interest, which fee shall be added to and become a part of the judgment.

LAKE GEORGE SHELL CORP.,

By A. W. TAYLOR,
Sec. and Tr.

No. 6404 due Jany. 8, 1929

We as endorsers, waive demand, notice, and protest, guarantee payment of this note, and acknowledge that we sign with full knowledge of this contract.

A. W. TAYLOR,
GEO. H. PEPPER,
SCOTT LITTON.

EXHIBIT NOTE NO. 2.

$5000.00 Dante, Va., Mar. 5th, 1924.

Sixty days ..... after date for value received We promise to pay to the order of The Dickenson County Bank FIVE THOUSAND and no/100 DOLLARS at the Dickenson County Bank, at Dante, Va.

The undersigned principal and endorsers of this note waive demand, notice and protest thereof, and agree that if this note is placed in the hands of an attorney at law for collection, or has to be sued on, that we will pay ten per cent attorney's fee in addition to the principal and interest, which fee shall be added to and become a part of the judgment.

No. 132 Due May 4, 1924.

(Signed) LAKE GEORGE SHELL CORP.,
By A. W. TAYLOR,
Sec. and Tr.

Reverse Side:

We, as endorsers, waive demand, notice and protest, guarantee payment of this note, and hereby acknowledge that we sign with full knowledge of this contract.

(Signed) A. W. TAYLOR,
(Signed) P. W. PERKINS,
(Signed) GEO. B. PEPPER,
(Signed) SCOTT LITTON.

THE ABOVE NOTE MARKED "RENEWED"

EXHIBIT GEORGE H. PEPPER LETTER NO. 1-b.

HOTEL WINDSOR
Modern, European Plan
W. W. Westmoreland, Prop.
Johnson City, Tenn.

Oct. 19th, 1929

Scott Litton,
South Clinchfield, Va.

Dear Scott:-

Enclosed please find note due tomorrow. Sorry I can't send interest, but I am not quite making ends meet—but believe I'll do better soon as winter comes—then I'll do better. Hope you all are well and doing well.

Hastily,

(Signed) GEO. H. PEPPER.

EXHIBIT GEO. H. PEPPER LETTER NO. 1-a.

HOTEL WINDSOR
Modern, European Plan
W. W. Westmoreland, Prop.
Johnson City, Tenn.

June 5th, 1929.

Scott Litton,
Clinchfield, Va.

Dear Scott:-

I did not pay the interest on my note because I could not. As you know I have lost every dollar I have. I had hoped I could make enough in the Retail Coal Business to keep the interest up, but I got sick and could hardly drag around, and while the Furnace Co. had a night watchman, the negroes in the Co. houses stole more than my profits. I put on another watchman, but they still stole from 3½ to 9½ tons from every car. I built a house around it and stopped it, then the Furnace stopped. Now I have a man backing me who is putting up a tipple and furnishing 2 trucks—so I hope soon to get on my feet.

Since Xmas I have done nothing except sell coal for summer and fall delivery, have had Sinis and Neuritis until I fell off 15 lbs. and nearly passed off. I went to the Dr. almost every day—finally I became discouraged and as a last chance had all of my teeth pulled. Now I feel better and believe I am going to get all right. I hope I can come again and be able to make money and keep all of my friends from losing by me.

Just as soon as I can do anything I will.

Sincerely,

(Signed) GEO. H. PEPPER

I can do nothing in Knoxville—I found I could not get money to live on while sick. When a man gets down, he has no friends if they have lost by him. I did not expect to go broke—if I had, I'd have tried at least to save my friends.

EXHIBIT GEORGE H. PEPPER LETTER NO. 1.

HOTEL WINDSOR
Modern, European Plan
W. W. Westmoreland, Prop.
Johnson City, Tenn.

Jany. 20, 1930.

Scott Litton,
Clinchfield, Va.

Dear Scott:

Enclosed please find note. I am sorry but I have no money to pay interest. I am barely making a living. The Coal business has been "shot to pieces" here by a fellow who has hurt everybody and ruined himself. Hope you are well & prosperous.

Sincerely,

(Signed) GEO. H. PEPPER.

EXHIBIT NOTE NO. 1-a.

Dante, Va., January 20th, 1931 $5,000.00
Due .....
No. .....

Three Months after date I promise to pay to the order of SCOTT LITTON, Clinchfield, Virginia
FIVE THOUSAND DOLLARS
(RENEWAL) DICKENSON COUNTY BANK, INC.,
Dante Branch, Dante, Va.

The maker and endorser each hereby waive the benefit of the HOMESTEAD EXEMPTION and all right to exemption from execution as to the debt evidenced by this obligation, and if default be made in the payment hereof at maturity hereby authorizes and empowers any Attorney of record to confess judgment against me for

the above sum and costs of suit with ten per cent collection charges. And the maker and endorser each hereby waives demand, protest and notice of non-payment hereof. WITH INTEREST AT 6% FROM DATE.

.....,

(Signed) GEO. H. PEPPER

Reverse side:

(Signed) A. W. TAYLOR

EXHIBIT NOTE NO. 1.

$10,000.00 Cleveland, Va., Sept. 22, 1923.

Six months .....6...: after date We promise to pay to the order of SCOTT LITTON

Ten Thousand and no/100 DOLLARS,

For value received, without offset, negotiable and payable at

THE PEOPLES BANK, CLEVELAND, VIRGINIA

We, the maker, or makers, and endorser, or endorsers on this note hereby severally waive the beneft of our HOMESTEAD EXEMPTIONS as to this debt, and we further severally waive presentation, demand, protest, notice of non-payment, and diligence in collection.

We, the maker, or makers, and endorser, or endorsers, on this note hereby severally guarantee payment hereof on demand at, or after, maturity, but if not paid at maturity and if placed in the hands of an attoreny for collection, we then agree to pay an attorney fee of 10% in addition to the principal and any accrued interest hereon as liquidation damages to owner hereof.

Address: 204 E. Bay St., Jacksonville, Fla.
Due: 3-22-24.

(Signed) A. W. TAYLOR
(Signed) GEO. H. PEPPER

Reverse Side:

I, the undersigned endorser, have full knowledge of the contents, contracts, and agreements herein, bind my-

self with each, and guarantee payment on demand at, or after, maturity.

(Signed SCOTT LITTON,
THE PEOPLES BANK OF CLEVELAND,
Incorporated,
Cleveland, Virginia
By P. H. JESSEE,
Cashier.

ABOVE NOTE STAMPED PAID.

Virginia:

In the Corporation Court of the City of Bristol.

Jean McNeil Pepper, Executrix, etc., Complainant.
vs.
Scott Litton, Dixie Splint Coal Company, et al, Defendants.

Motion in Chancery to Strike Amended and Supplemental Answer of Scott Litton, and each paragraph thereof, filed in this cause on April 24, 1936.

Now comes the Complainant, by Counsel, and moves the Court to strike from the record in this cause the Amended and Supplemental Answer of Scott Litton, filed in this cause of April 24, 1936. The grounds for this motion are as follows:

1.

All of the alleged rights and equities of the Defendant against Complainant and A. P. Pepper, deceased, have been fully and finally adjudicated by the Supreme Court of Appeals of Virginia.

2.

The Amended and Supplemental Answer of the Defendant, Scott Litton, utterly and totally disregard the opinion of the Supreme Court of Appeals of Virginia.

3.

The Defendant, Scott Litton, made the deceased George H. Pepper, a party Defendant to the cross-bill filed by the said Scott Litton (R. 65) and sought no relief by way of set off and claimed no rights as against the said George H. Pepper; and the set-offs, rights and equities now claimed by the said Scott Litton, after the death of both A. P. Pepper and George H. Pepper, are clearly an after-thought, which this Court will refuse to consider.

4.

The said Amended and Supplemental Answer shows, on its face, that the alleged debts sought to be off-set are barred by the Statute of Limitations.

5.

The alleged right of off-set is asserted against Complainant and her decedent without regard to the Statute of Frauds.

6.

The obvious and patent purpose of the said Amended and Supplemental Answer is to hinder, delay and prevent the Complainant from obtaining the judgment to which she is legally entitled under the decision of the Supreme Court of Virginia.

JEAN McNEIL PEPPER, Executrix etc.
By Counsel.

A. K. MORISON,
WARREN & CANTWELL
4-24-36

Virginia:

In the Corporation Court of the City of Bristol.

Jean McNeil Pepper, Executrix, etc. Complainant,
vs. () In Chancery.
Scott Litton, Dixie Splint Coal Co., et al, Defendants.

MOTION IN CHANCERY.

Now comes the Complainant, by Counsel, and moves the Court for judgment against the Defendants, jointly and severally, in accordance with the prayer of Complainant's Petition filed herein on November 6, 1935.

JEAN McNEIL PEPPER, Executrix, etc.
By Counsel.

A. K. MORISON,
WARREN & CANTWELL

Filed Apr. 24, 1936.

April 24, 1936

Jean McNeil Pepper, Executrix, etc.
vs.
Dixe Splint Coal Company, et al

On April 6, 1936, the first day of this term of Court, Scott Litton by counsel presented and asked leave to file an amended and supplemental answer herein and thereupon complainant by counsel, asked that the matter be left open for time to consider said amended and supplemental answer until today, April 24th, when said amended and supplemental answer was again presented and asked to be filed, to the filing of which, complainant by counsel objected orally, and after argument, the Court overruled the objections and allowed said amended and supplemental answer to be filed, which is accordingly done. To which action, complainant excepts. Thereupon, complainant by counsel filed a motion to strike said amended and supplemental answer of Scott Litton and each paragraph thereof, and assigned the grounds thereof in writing; which motion to strike was also argued by counsel Whereupon, the Court doth deny said motion in part, and doth sustain said motion in part, that is to say, the Court allows said answer to stand except as follows: Paragraphs 4, 5, 6, 7 and Clause (b) of Paragraph 9 are stricken out. To which action the defendant, Scott Litton, by counsel excepts, and complainant by counsel excepts to the action of the Court in not sustaining said motion to strike in toto.

Thereupon, complainant by counsel filed a written motion asking for judgment in accordance with the prayer of her petition filed herein on November 6, 1935, to which the defendants by counsel objected, and the matter was argued by counsel. Whereupon, the Court doth deny said motion, and counsel excepts. Thereupon, no further proceeding being asked for, the cause is continued until the first day of the next term of Court.

A Copy, Teste:

J. M. KELLY,
Clerk.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 4378.

Scott Litton, Creditor, Appellant,

versus

Jean McNeil Pepper, Appellee.

In the Matter of Dixie Splint Coal Company, Bankrupt.

On Appeal to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Big Stone Gap. In Bankruptcy.

July 21, 1938, petition for an appeal under section 24b of the Bankruptcy Act, together with exhibits, including certified copies of assignment of errors, petition for appeal, order allowing appeal, *supersedeas* bond, citation, opinions and order of the said District Court, filed and the petition is docketed.

Same day, the appearance of Henry Roberts is entered for the appellant.

July 27, 1938, the appearance of Ira M. Quillen is entered for the appellant.

October 3, 1938 (October term, 1938), petition for appeal is presented, in Open Court, and argued by counsel in support thereof, before Parker, Northcott and Soper, Circuit Judges, and submitted.

ORDER ALLOWING APPEAL.

Filed and Entered October 3, 1938.

(Style of Court and Title Omitted.)

Scott Litton, Creditor, having prayed for an allowance of an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, from the order made and entered by the District Court of the United States for the Western District of Virginia, on the 23rd day of June, 1938, in the cause in that Court entitled "In the matter of Dixie Splint Coal Company, Bankrupt, in Bankruptcy, No. .....", and from each and every part thereof, wherein said Scott Litton has been affected, and having presented and filed his petition for appeal, Assignment of Errors, and prayer for reversal, pursuant to the Statute, and rules of the United States Circuit Court of Appeals for the Fourth Circuit in such case made and provided.

IT IS NOW HERE ORDERED that an appeal be, and the same is hereby, allowed as prayed to the United States Circuit Court of Appeals for the Fourth Circuit from the District Court of the United States for the Western District of Virginia, in this cause, as provided by law; and

IT IS FURTHER ORDERED that this appeal under section 24b of the Bankruptcy Act and the appeal allowed by the District Judge in this cause be, and the same are hereby, consolidated for the purpose of hearing; and

IT IS FURTHER ORDERED that the Clerk of the District Court of the United States for the Western District of Virginia, in accordance with the statutes and rules of the said Circuit Court of Appeals, shall prepare and certify only one transcript of record, proceedings and order, which shall constitute the record in both appeals, and shall transmit the same to the said United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, so that he shall have the same in said Court within forty days from the date hereof.

AND IT IS FURTHER ORDERED that this order operate as a *supersedeas*, and that the *supersedeas* bond in the sum of $5,000.00, with a United States Government bond for $5,000.00 pledged as security therefor, heretofore filed in said District Court and intended as a *supersedeas* bond in both appeals, and heretofore approved by the District Judge, is hereby approved as the *supersedeas* bond herein October 3d, 1938.

JOHN J. PARKER,
Senior Circuit Judge.

On the same day, to-wit, October 3, 1938, citation, signed by Judge Parker, is issued, returnable within forty days.

Same day, the original appeal papers, pursuant to Rule 36, are transmitted to the Clerk of the said District Court at Big Stone Gap, Va.

October 13, 1938, the appearance of M. M. Heuser and A. K. Morison is entered for the appellee.

ARGUMENT OF CAUSE.

October 14, 1938 (October term, 1938), cause came on to be heard, together with No. 4392, before Northcott and Soper, Circuit Judges, and Webb, District Judge, and is argued by counsel and submitted.

October 17, 1938, the original appeal papers are returned by the Clerk of the said District Court.

OPINION.

Filed January 9, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 4378.

SCOTT LITTON, Creditor,
Appellant,

versus

JEAN MCNEIL PEPPER,
Appellee.

IN THE MATTER OF
DIXIE SPLINT COAL COMPANY,
Bankrupt.

On Appeal to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Big Stone Gap. In Bankruptcy.

No. 4392.

SCOTT LITTON, Creditor,
Appellant,

versus

JEAN MCNEIL PEPPER,
Appellee.

IN THE MATTER OF
DIXIE SPLINT COAL COMPANY,
Bankrupt.

Appeal from the District Court of the United States for the Western District of Virginia, at Big Stone Gap. In Bankruptcy.

(Argued October 14, 1938. Decided January 9, 1939.)

Before NORTHCOTT and SOPER, Circuit Judges, and WEBB, District Judge.

HENRY ROBERTS (IRA M. QUILLEN on brief) for Appellant, and M. M. HEUSER (A. K. MORISON on brief) for Appellee.

SOPER, Circuit Judge:

This appeal was taken from the action of the District Judge in disallowing the claim of a judgment creditor against the bankrupt estate, although the trustee in bankruptcy had previously endeavored to set aside the judgment in a proceeding in the courts of Virginia and had been met with an adverse decision which was affirmed by the Supreme Court of Appeals of the State.

The judgment was confessed in the Circuit Court for Russell County, Virginia, on July 1, 1931 for the sum of $33,468.89 on behalf of the Dixie Splint Coal Company, Inc., the bankrupt, by P. H. Smith, secretary-treasurer of the company, in favor of Scott Litton, its president and controlling stockholder. The claim was based on alleged arrearages of salary due Litton as president and similar arrearages due Smith as secretary treasurer, and

by him assigned to Litton. The circumstances relating to the accumulation of the arrearages and the questionable financial condition of the company at the time of the confession of judgment, culminating finally in bankruptcy, led the District Judge to the firm conviction that the claim was fraudulent from its inception and unworthy to share in the distribution of the assets of the estate.

The judgment was entered during the pendency of a suit against the corporation instituted in the Corporation Court of the City of Bristol, Virginia, by one A. P. Pepper, lessor of coal property to the corporation, to secure an accounting of royalties and rents due under the lease. This suit, which was continued in the name of Mrs. Pepper as executrix and sole devisee of the lessor after his death, finally resulted on February 19, 1934, in a decree for the plaintiff in the sum of $9,000. See *Pepper v. Dixie Splint Coal Co.*, 165 Va. 179, 189, on September 19, 1935.

On March 19, 1934 Litton caused an execution on his judgment to be levied on the personal property of the corporation; and the sheriff gave notice of a sale thereof to be held on June 14. On June 2 Mrs. Pepper caused an execution to be levied on her judgment. On June 13, 1934 she instituted a suit in the Circuit Court for Russell County to have the Litton judgment declared void as fraudulent and improperly entered. The sale under the Litton execution took place as advertised and resulted in the sale of the property to Litton for $3,200. In view of these conflicting claims, the sheriff brought suit by way of interpleader in the Circuit Court for Russell County to determine who was entitled to the proceeds of the sale, and Pepper, Litton and the Clinchfield Coal Corporation, a third judgment creditor, were made parties defendant. Litton admitted in his answer that the Clinchfield Coal Corporation had a first or paramount lien in the amount of $2153 on the property, but claimed that by reason of the levy upon his judgment, he had a superior lien to the lien of Pepper; and Pepper also admitted the priority of the Clinchfield lien, without prejudice to her rights and claims asserted in the suit previously brought by her to set aside and have declared void the Litton judgment.

On September 7, 1934 an adjudication in bankruptcy was had in a voluntary proceeding of the Coal Company; and on October 3, 1934 the trustee in bankruptcy filed a petition in the interpleader case and asked that the balance of $961 be paid over to him; and this was done, Litton and Pepper consenting. Pepper then petitioned the referee in bankruptcy to direct the trustee to intervene in the litigation instituted by her to set aside the judgment, and the referee acceded to action by the trustee, but ordered him to bring a new and independent suit in the State court to determine the validity of the judgment and the execution thereon. Accordingly, the trustee brought suit in the Circuit Court for Russell County and prayed the court to vacate and set aside the judgment and to quash the execution thereon on the ground that the judgment was void ab initio, because no power of attorney authorizing Smith to confess judgment had been executed by the corporation or filed in the court as required by Section 6130 (a) of the Virginia Code. No charge was made as to the validity of Litton's claim against the corporation perhaps for the reason that P. H. Smith, who was the secretary-treasurer of the corporation and confessed judgment on its behalf, was also the trustee in bankruptcy.

The judge of the State court was of the opinion that the judgment was void in that it did not comply with the statutory procedure but held, nevertheless, that the trustee was estopped from challenging the validity of the judgment. The contention that the trustee was estopped by entering the interpleader proceedings and asking for the proceeds of the sale of the property was overruled, because this step was taken on his behalf by I. M. Quillen, who was also attorney for Litton. But the estoppel was upheld because the independent suit of the trustee inured to the benefit of Mrs. Pepper, who appeared to be the sole remaining creditor of the bankrupt estate, and was herself estopped from challenging the judgment since she had elected to treat it as valid when she laid claim to the proceeds of the execution. The relief prayed by the trustee was therefore denied, and his motion to vacate the judgment was dismissed. This decision was affirmed on appeal in *Smith* v. *Litton*, 167 Va. 263. The Supreme Court did not pass on the validity

of the judgment under the Virginia statute, but held that, whether or not the judgment was void, the trustee was estopped from challenging it because he represented Mrs. Pepper, the sole creditor of the corporation, and was affected by the estoppel binding upon her.

Subsequently, the referee in bankruptcy, following the decision of the State court, overruled exceptions filed by Mrs. Pepper to the allowance of the Litton judgment as a claim against the estate; but this action was set aside by the District Judge who held that the decision was not binding upon the District Court. Comment was made in the opinion of the District Judge upon the extraordinary selection as trustee of the bankrupt estate of P. H. Smith, whose prior actions as secretary-treasurer of the bankrupt company, in cooperation with the president thereof, were the subject of attack; and also upon the indefensible selection, as attorney for the trustee, of I. M. Quillen, who had previously been the attorney for the bankrupt, and after bankruptcy continued to act as attorney for Litton. The evidence tending to show that the Litton claim was based upon a gross and obvious fraud was also discussed at length. With these considerations in mind, the District Judge said that the bankruptcy court, not from necessity but through comity, had sought the aid of the State court to determine a question material to the administration of the bankrupt estate, but that the decision of the State court, whether right or wrong, did not prevent the District Court from considering the validity of the judgment in connection with the administration of the estate, since this matter was committed to the court by the terms of the bankruptcy statute. Reference was made to such cases as *Lesser* v. *Gray*, 236 U. S. 70; *U. S. Fidelity Company* v. *Bray*, 225 U. S. 205 in which the full power of the bankruptcy court under the statute to inquire into the validity of a demand or claim against the estate is described; and *In re Continental Engine Co.*, 7 Cir., 234 F. 58; and *Chandler* v. *Thompson*, 7 Cir., 120 F. 940, in which it was held that a reduction of a claim to judgment in a State court before bankruptcy does not exempt it from attack in the bankruptcy court when its allowance is sought in bankruptcy proceedings. See also *United States* v. *Wood*, 2 Cir., 290 F. 109, 263 U. S. 680.

These decisions, however, do not envision the situation which results when the trustee in bankruptcy has sought and obtained the decision of a competent state tribunal upon the validity of a disputed claim or judgment against the estate. Whether or not the bankruptcy court must then accept the decision of the State court as binding upon it, or may still proceed to adjudicate the dispute, depends upon the application of the principle of *res judicata*. The jurisdiction of the State court to hear and determine the matter brought before it by the independent suit of the trustee in bankruptcy herein cannot be successfully denied; *Mays* v. *Fritton*, 20 Wall. 414; *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526; 5 *Remington Bankruptcy*, Sections 2183, 2170; and the binding effect of the decision of the court is equally well established. *Mays* v. *Fritton, supra*, (p. 418); *Winchester* v. *Heiskell*, 119 U. S. 450; *Davis* v. *Friedlander*, 140 U. S. 570; *Linstroth Wagon Co.* v. *Ballew*, 5 Cir., 143 F. 960; *Herman* v. *Cullerton*, 7 Cir., 13 F. 2d 754; 5 *Remington Bankruptcy*, Section 2182. We find nothing in the case of *Isaacs* v. *Hobbs Tie & S. Co.*, 282 U. S. 734, upon which the appellee relies, at variance with these conclusions. The decree of the District Court in case No. 4378 must therefore be reversed, with instructions to give effect to the decision of the State court. The appeal is dismissed in case No. 4392.

No. 4378 *Reversed.*

No. 4392 *Appeal Dismissed.*

JUDGMENT

Filed and Entered January 10, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 4378.

Scott Litton, Creditor, Appellant,
vs.
Jean McNeil Pepper, Appellee.

In the Matter of
Dixie Splint Coal Company,
Bankrupt.

ON APPEAL to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, at Big Stone Gap, with instructions to give effect to the decision of the State Court, and for further proceedings in accordance with the opinion of the Court filed herein.

January 10, 1939.

MORRIS, SOPER,
U. S. Circuit Judge.

"Appellee's petition for rehearing—covering 40 pages, presented Feb. 8, 1939, omitted from this print. It was denied, and nothing more by order of Feb. 28, 1939."

Same day, to-wit, February 8, 1939, petition of appellee for a stay of the mandate is filed.

ORDER STAYING MANDATE.

Filed February 11, 1939.

(Style of Court and Title Omitted.)

UPON THE APPLICATION of the Appellee, by his counsel M. M. Heuser and A. K. Morison, Esquires, for a stay of the mandate in the above entitled cause, and it appearing that the Appellee has presented a petition for a rehearing of the said cause,

IT IS ORDERED that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the action of the Court on the said petition for a rehearing.

February 10, 1939.

JOHN J. PARKER,
Senior Circuit Judge.

ORDER DENYING REHEARING.

Filed and Entered February 28, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 4378.

Scott Litton, Creditor, Appellant,

vs.

Jean McNeil Pepper, Appellee.

In the Matter of
Dixie Splint Coal Company, Bankrupt.

ON APPEAL to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Big Stone Gap. In Bankruptcy.

THIS COURT having at its January term, 1939, rendered its decision reversing the decree of the said District Court appealed from in this cause, and the appellee having on February 8, 1939, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

IT IS NOW HERE ORDERED BY THIS COURT that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days.

ELLIOTT NORTHCOTT,
U. S. Circuit Judge.
MORRIS A. SOPER,
U. S. Circuit Judge.
E. Y. WEBB,
U. S. District Judge.

Endorsed:

"Filed and Entered Feb. 28, 1939.

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit."

March 4, 1939, petition of appellee for a stay of the mandate is filed.

ORDER STAYING MANDATE.

Filed March 7, 1939.

(Style of Court and Title Omitted.)

UPON THE PETITION of the Appellee, by his

counsel, M. M. Heuser and A. K. Morison, and for good cause shown,

IT IS ORDERED that the mandate of this Court in the above entitled cause be, and the same is hereby stayed pending the application of the Appellee in the Supreme Court of the United States for a writ of *certiorari*, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the Supreme Court within 30 days from this date.

March 6th, 1939.

JOHN J. PARKER,
Senior Circuit Judge.

March 29, 1939, petition of appellee for a further stay of the mandate is filed.

ORDER FURTHER STAYING MANDATE.

Filed April 1, 1939.

(Style of Court and Title Omitted.)

UPON THE PETITION of the Appellee, by his counsel, M. M. Heuser and A. K. Morison, and for good cause shown,

IT IS ORDERED that the mandate of this Court in the above entitled cause be, and the same is hereby further stayed pending the application of the Appellee in the Supreme Court of the United States for a writ of *certiorari*, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the Supreme Court within 15 days from this date.

March 31, 1939.

JOHN J. PARKER,
Senior Circuit Judge.

April 15, 1939, petition of Appellee for a further stay of mandate is filed.

ORDER FURTHER STAYING MANDATE.

Filed and Entered April 15, 1939.

(Style of Court and Title Omitted.)

UPON THE PETITION of the Appellee, by his counsel, M. M. Heuser and A. K. Morison, and for good cause shown,

IT IS ORDERED that the mandate of this Court in the above entitled cause be, and the same is hereby, further stayed pending the application of the Appellee in the Supreme Court of the United States for a writ of *certiorari*, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the Supreme Court within 15 days from this date.

April 15, 1939.

ELLIOTT NORTHCOTT,
U. S. Circuit Judge.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 4392.

Scott Litton, Creditor, Appellant,
versus
Jean McNeil Pepper, Appellee.

In the Matter of
Dixie Splint Coal Company, Bankrupt.

APPEAL from the District Court of the United States for the Western District of Virginia, at Big Stone Gap. In Bankruptcy.

August 24, 1938, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, *supersedeas* bond, and citation are certified up.

Same day, the appearance of Henry Roberts is entered for the appellant.

Same day, the original Report of Hearing before the Referee and copies of Income Tax Returns are sent up.

Same day, petition of appellant for leave to print only six complete copies of the record is filed.

ORDER OMITTING THE PRINTING OF THE TWO RECORDS OF THE SUPREME COURT OF APPEALS OF VIRGINIA.

Filed August 26, 1938.

(Style of Court and Title Omitted.)

UPON THE APPLICATION of the appellant in the above-entitled case, by his counsel Ira M. Quillen and Henry Roberts, Esqs., and for good cause shown.

IT IS ORDERED that in the printing of the record in this case, the printing of the two records of the Supreme Court of Appeals of Virginia in the cases of P. H. Smith, Trustee of the estate in bankruptcy of Dixie Splint Coal Company, Incorporated, Bankrupt, *vs.* Scott Litton, from the Circuit Court of Russell County, Va., and Jean McNeil Pepper, Executor, etc. *vs.* Hon. Floyd H. Roberts, Judge of Corporation Court of Bristol, petition for mandamus, may be omitted, provided that six printed copies of said records shall be furnished for the use of this Court.

August 25, 1938.

JOHN J. PARKER,
Senior Circuit Judge.

August 27, 1938, the appearance of Ira M. Quillen is entered for the appellant.

August 30, 1938, stipulation as to the time for the filing of the respective briefs is filed.

September 9, 1938, the appearance of M. M. Heuser and A. K. Morison is entered for the appellee.

September 10, 1938, twenty-five copies of the printed record are filed.

ARGUMENT OF CAUSE.

October 14, 1938, (October term, 1938), cause came on to be heard, together with No. 4378, before Northcott and Soper, Circuit Judges, and Webb, District Judge, and is argued by counsel and submitted.

OPINION.

Filed January 9, 1939.

(Memo. of Clerk: The opinion appears at page 407 of the transcript of record and is, therefore, omitted here.)

DECREE.

Filed and Entered January 10, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 4392.

Scott Litton, Creditor, Appellant,

vs.

Jean McNeil Pepper, Appellee.

In the Matter of
Dixie Splint Coal Company,
Bankrupt.

APPEAL from the District Court of the United States for the Western District of Virginia.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the appeal in this cause, be, and the same is hereby, dismissed with costs.

January 10, 1939.

MORRIS A. SOPER.
U. S. Circuit Judge.

CLERK'S CERTIFICATE.

UNITED SATAES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled causes, as the same remain upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 21st day of April, A. D., 1939.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 5, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
APR 27 1939
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 39

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

M. M. Heuser,
Robt. Burrow,
A. K. Morison,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 914

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON.

IN THE MATTER OF

DIXIE SPLINT COAL COMPANY, BANKRUPT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Petition of Jean McNeil Pepper respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This litigation results from the effort of Scott Litton to prevent the petitioner from collecting, in bankruptcy, the judgment of the Corporation Court of the City of Bristol, Virginia, against Dixie Splint Coal Company, now bankrupt, for $9,000.00, with interest and costs, rendered February 19, 1934.

Litton's fraudulent efforts to prevent said judgment in the first instance are fully stated in the opinion of the Supreme Court of Appeals of Virginia in the case of *Pepper* v. *Dixie Splint Coal Company*, 165 Va. 179, 181 S. E. 406, to which petitioner invites the Court's consideration.

The fraudulent conduct of Dixie Splint Coal Company is the conduct of Scott Litton. The District Court, in the course of its first opinion in this proceeding, said:

> "An examination of the facts disclosed here shows the history of a deliberate and carefully planned attempt on the part of Scott Litton and Dixie Splint Coal Company to avoid the payment of a just debt. I speak of Litton *and* Dixie Splint Coal Company because they are in reality the same" (R. 53-61).

On June 2, 1933, while the suit in the Bristol court was approaching judgment, Litton sent the secretary-treasurer of his company to the Clerk's Office of Russell County, Virginia, and attempted to have him confess judgment in Litton's favor for $33,468.89 (R. 181-184). The attempted confession of judgment was without warrant of authority required by the Virginia Code, Section 6130A. The confessed judgment was subsequently declared to be void upon its face by the Circuit Court of Russell County, Virginia (R. 153); and was held to be void by the referee (R. 109), which holding was expressly approved by the District Court although Litton had not appealed from the referee's holding (R. 120).

On June 2, 1933, the day the void judgment was docketed, Litton sued out execution thereon, but withheld levying thereunder; and no lien was secured on the company's property.

On February 19, 1934, when petitioner obtained her judgment against the company in the Bristol court, Litton then falsely represented to the Bristol court that his company intended to appeal from its judgment to the Supreme Court

of Appeals of Virginia; and on this representation secured a stay of execution on petitioner's judgment for a period of ninety days (R. 215).

On March 19, 1934, during the ninety-day period when execution was stayed on petitioner's judgment, Litton sued out a second execution on his void judgment, and on the same day levied the execution on all of the tangible property of the company; but no sale was then advertised thereunder (R. 184, 254).

On May 31, 1934, at the expiration of the ninety-day period during which execution on petitioner's judgment was stayed, petitioner sued out execution on her judgment and had it levied on June 2, 1934, on all the tangible property of the company (R. 237, 238).

On June 2, 1934, the same day on which petitioner's execution was levied, the sheriff, "who seems to have been cooperating with Litton" (R. 62), advertised a sale to be made June 14, 1934, under Litton's execution, which had been levied two and one-half months previously on all the company's property (R. 216, 217, 254, 255).

On June 13, 1934, the day preceding the advertised execution sale under the Litton void judgment, petitioner filed her bill in the Circuit Court of Russell County alleging that the Litton judgment was void; that the company was not indebted to Litton in any sum; and prayed that the sale be enjoined (R. 210). But, on account of the absence of the judge, the prayer for injunction was not acted upon.

On June 14, 1934, the execution sale under the Litton void judgment was held; and Litton became the purchaser of all the tangible property of the company at the price of $3200.00 (R. at 238).

On June 16, 1934, two days after the Litton execution sale, Litton caused the board of directors of his one-man corporation to adopt a resolution authorizing the voluntary bankruptcy of the company (R. 1); but, as will hereinafter be

shown, the company's voluntary petition in bankruptcy was not filed until eighty days later, namely, on September 4, 1934 (R. 1).

During this eighty-day interval Litton's execution levy under the confessed judgment became more than four months old; and petitioner's levy, under her execution, was yet less than four months old.

On June 16, 1934, the company resolved and duly executed to the Clinchfield Coal Corporation a release deed for the company's only available coal supply (R. 101).

On June 21, 1934, Scott Litton procured the incorporation of the Dixie Beaver Coal Corporation (R. 106), to which Litton sold all of the personal or mining property which he had purchased under his void execution sale for $3,200.00, and received capital stock of the Dixie Beaver Coal Company therefor in the par amount of $20,135.36 (R. 106).

On June 22, 1934, Litton's Dixie Beaver Coal Company, incorporated the preceding day, obtained a coal mining lease of the same premises which the Dixie Spint Coal Company had released on June 16, 1934 (R. 105-106).

On June 15, 1934, the sheriff of Russell County, Virginia, interpleaded Clinchfield Coal Corporation, petitioner, and Scott Litton, for the purpose of determining to whom the proceeds realized from the execution sale under the Litton Void judgment, namely, $3,200.00, should be paid (R. 237).

Litton and Pepper filed answers admitting the priority of the lien asserted by the Clinchfield Coal Corporation for coal rents or royalties in the amount of $2,153.00; but petitioner, by her answer, made the following express saving:

> "Without prejudice to her rights and claims asserted in the chancery cause of Jean McNeil Pepper, Executrix, etc. *v.* Scott Litton, et als., now pending in the Circuit Court of Russell County, Virginia, the general object of which is to set aside and have declared void a judgment under which the sale was made" (R. 241).

The answer quoted from is the basis of the alleged estoppel invoked by Litton against petitioner.

On September 4, 1934, the Dixie Splint Coal Company, pursuant to the resolution adopted eighty days preceding, filed its voluntary petition in bankruptcy (R. 1); and the first meeting of creditors was held September 26, 1934. Petitioner had no notice of the first meeting of creditors, and was neither present nor represented (R. 24), because Litton had not given her address, which was well known to him, in the bankruptcy schedules of said company.

At said meeting P. H. Smith, the secretary and treasurer of the bankrupt, was elected trustee; and I. M. Quillen, personal attorney for Litton, was selected as attorney for the trustee (R. 3, 4).

At this meeting Litton filed his proof of claim, claiming thereby a first lien upon the assets of the bankrupt estate by virtue of the lien of a writ of *fieri facias* issued from his confessed judgment more than four months prior to bankruptcy (R. 4, 5). The funds upon which the alleged lien was asserted came into the trustee's hands for administration by the bankruptcy court. A fund of $6,192.20 constitutes the present bankrupt estate (R. 117).

On December 18, 1934, petitioner filed objections to Litton's claim, both as a secured claim and as a common claim (R. 6). Previously petitioner had moved the Circuit Court of Russell County to quash the execution issued on the Litton void judgment (R. 228). Litton opposed this motion on the ground that such action could not be maintained by anyone "except in the name of the Trustee" (R. 230, 231).

On October 15, 1934, (R. 271), petitioner filed a petition in bankruptcy praying that the trustee be directed to contest the validity of the Litton judgment in the State courts; and on October 17, 1934, the referee entered an order granting such relief (R. 270).

On October 19, 1934, Litton's attorney protested the referee's order on the ground that petitioner had not filed formal proof of her claim in bankruptcy (R. 275-277).

The referee reheard the matter on November 8, 1934 (R. 19). At this hearing Litton's attorney made the contention "that Jean McNeil Pepper is estopped to contest the validity of the judgment of Scott Litton by reason of her acts and conduct in relation thereto." Petitioner's answer in the interpleader suit, hereinbefore quoted, was placed in evidence before the referee at this time and is the ground of the "estoppel" then attempted to be invoked by Litton (R. 21-23).

On December 18, 1934, after hearing argument of counsel, the referee in bankruptcy "for an orderly administration" of the bankrupt estate, ordered the trustee, by counsel, to institute proceedings in the Circuit Court of Russell County:

> "for the purpose of testing the validity of the judgment" (R. at 189).

By this order the referee denied the contention that petitioner was estopped to question the validity of the Litton judgment. Litton sought no review of this order.

On January 10, 1935, the trustee proceeded by a motion to abate the Litton void judgment. Prior to the date of that motion Litton purchased, or attempted to purchase, and to have withdrawn every unsecured claim in bankruptcy against the bankrupt estate except the claim of this petitioner (R. 303). At this same time no general or unsecured claim against the bankrupt estate had been either allowed or disallowed; and time remained in which to file the same (R. 321-327).

Thereafter, namely, on April 23, 1935, several unsecured claims in bankruptcy were duly allowed (R. 32-34). Petitioner's claim was not allowed until February 4, 1938 (R. 116).

The trustee, by appropriate proceedings in the State court, attempted to determine the validity or the invalidity of the Litton judgment (R. 178). The attack upon the judgment was direct; and the proceeding by the trustee was in behalf of Dixie Splint Coal Company, the bankrupt, alleged judgment-debtor. The State court erroneously decided that the right of the trustee in bankruptcy to attack the Litton judgment was acquired under Section 70e of the Bankruptcy Act (R. at 154). This section of the Act invests the trustee with the right to avoid any *transfer of property* made by the bankrupt which any *creditor* might avoid.

The State court then proceeded, over the objection of the counsel for the trustee, to determine who were, or would be, in bankruptcy, the creditors of the bankrupt estate; and, who would benefit by the success of the trustee's suit. The State court held (contrary to the actual facts) that petitioner was the sole creditor in the bankruptcy proceedings; and that the trustee in bankruptcy represented the petitioner alone (R. at 156, 157); and, that petitioner's answer, hereinbefore quoted from, "treated" the execution sale as a valid sale; and, that such treatment amounted to the "recognition" of the validity of the Litton judgment.

Upon these premises the trial court proceeded to the conclusion that the trustee was "estopped" at that time to have the Litton judgment decreed invalid; but the said court expressed the opinion in writing that the judgment was void upon its face (R. at 153).

Counsel for the trustee excepted to the trial court's adverse ruling, and appealed to the Supreme Court of Appeals of Virginia (R. 143). That court affirmed the lower court *in toto* (*Smith* v. *Litton*, 167 Va. 263, 188 S. E. 214).

On February 22, 1937, the referee overruled the petitioner's objection to the allowance of Litton's claim, holding that she was estopped to deny the validity of the Lit-

ton judgment by reason of the State court's decisions (R. 45).

On April 22, 1937, the District Court, on review, reversed the referee's decision. In a written opinion (R. 53) the court reviewed the history of the case and frauds Litton had attempted to perpetrate upon the bankruptcy court and this petitioner.

The court specifically held that the duty to administer the estate of the bankrupt belonged exclusively to the bankruptcy court and could neither be delegated nor lost.

The District Court remanded the proceedings to the referee with direction to pass upon the objections filed to the allowance of Litton's claim, both as a lien claim and as a common claim (R. 52).

On February 4, 1938, the referee in bankruptcy entered an order holding (1) that the Litton judgment was void; (2) that Litton's objection to petitioner's claim was overruled and her claim allowed as an unsecured claim; (3) that petitioner was estopped to assert objections to Litton's claim and that the claim was allowed as a secured claim; (4) that the Litton claim was valid as a common claim; (5) that petitioner was barred by laches and estopped from seeking an appraisal of the bankrupt's property sold to Litton under his void execution of sale for $3,200.00 (R. 107-116).

Litton did not seek review of the two holdings of the referee which were adverse to him, to-wit: that his confessed judgment is void, and that his objections to petitioner's claim be overruled. These holdings thus became final.

Petitioner, however, sought review of the referee's holdings that were adverse to her (R. 117-120); and on June 23, 1938, the District Court sustained her contentions, and entered an order disallowing Litton's claim either as a secured claim or as a common claim (R. 120, 121).

The written opinion of the court discloses that *the claim was disallowed because the Litton judgment was void, and,*

because the account on which the judgment had been confessed was fraudulent and fictitious (R. 122-132).

Litton appealed to the Circuit Court of Appeals for the Fourth Circuit from the order of the District Court in disallowing his claim both as a lien claim and as a common claim (R. 403).

On January 9, 1939, the Circuit Court of Appeals (*Litton* v. *Pepper*, 100 F. (2d) 830) reversed the District Court" with instructions to give effect to the decision of the State court (*Smith, Trustee,* v. *Scott Litton,* 167 Va. 263, 188 S. E. 214).

On February 28, 1939, the Circuit Court of Appeals denied a rehearing petitioned for by this petitioner (R. 453).

B.

Jurisdictional Statement.

Petitioner shows that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of Bankruptcy Act, Section 24c, as amended June 22, 1938, 52 Stat. 854 (11 U. S. C. A., Section 47c), which provides:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

This Court has jurisdiction to review the judgment complained of by certiorari. Judicial Code, Section 240 (28 U. S. C. A., Sec. 347), provides that in any case in a circuit court of appeals it shall be competent for this Court, upon the petition of any party thereto, to require by cer-

tiorari that the cause be certified to this Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought up by unrestricted writ of error or appeal.

C.

The Questions Presented.

Petitioner submits that the record in this cause presents for determination the following questions:

1. Did the court of bankruptcy have exclusive, non-delegable jurisdiction to adjudge whether the claim of Scott Litton should be allowed for payment from assets of the bankrupt estate in the control and custody of the bankruptcy court?

2. Will the court of bankruptcy permit its processes to be used in the consummation of an obviously fraudulent scheme; or, lend its aid to one who is proved guilty of conduct in violation of the fundamental conceptions of equity jurisprudence?

D.

Reasons Relied on for Allowance of the Writ.

Petitioner relies upon the following reasons for the allowance of a writ of certiorari:

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court on the jurisdiction of courts of bankruptcy.

The Circuit Court of Appeals held, in effect, that the District Court as a court of bankruptcy did not have exclusive, non-delegable jurisdiction to allow or disallow a claim presented for allowance and payment in the bankruptcy court.

This Court has repeatedly held that the jurisdiction of

the courts of bankruptcy in such matters is not only paramount, but exclusive of all other courts:

U. S. F. & G. Co. v. *Bray*, 225 U. S. 205, 32 S. Ct. 620, 56 L. Ed. 1055;

U. S. v. *Wood*, 290 Fed. 109, affirmed 263 U. S. 680, 44 S. Ct. 134.

This Court has also held that the jurisdiction to allow, disallow and reconsider claims filed in bankruptcy cannot be abandoned, delegated or surrendered, even by the bankruptcy court itself:

Isaacs v. *Hobbs T. & T. Co.*, 282 U. S. 739, 51 S. Ct. 270, 75 L. Ed. 645;

Gross v. *Irving Trust Co.*, 289 U. S. 342, 53 S. Ct. 605, 77 L. Ed. 1243.

The Circuit Court of Appeals also decided contrary to the applicable decisions of this Court on the requirements for the applicability of the rule of *res judicata*. Said court held that the judgment of the State court, although rendered in a suit upon a different subject matter and for a different purpose, should be accorded binding effect in the bankruptcy court in a contest over the allowability of a claim. This Court has repeatedly held that for a plea of *res judicata* to be availing it must be shown that the judgment relied on was (1) made by a court of competent jurisdiction, (2) upon the same subject matter, (3) between the same parties, and (4) for the same purpose.

Aspden v. *Nixon*, 4 How. 467, 11 L. Ed. 1059;

Washington, etc., Packet Co. v. *Sickles*, 24 How. (65 U. S.) 333, 16 L. Ed. 650.

The Circuit Court of Appeals also held contrary to the decisions of this Court that the suit in the Circuit Court of Russell County, Virginia, by the trustee against Litton was

in the nature of a suit against an "adverse claimant" concerning property acquired or claimed by the trustee.

This Court has held that one claiming to be a lienholder on property or funds in the custody and control of the bankruptcy court (such as Litton is doing in this case), is not an "adverse claimant"; and that, therefore, the bankruptcy court has exclusive jurisdiction to pass upon the asserted lien claim.

Ex Parte City Bank, 3 How. 292, 11 L. Ed. 603;
Norton v. *Boyd*, 3 How. 426, 11 L. Ed. 664.

2. The decision of the Circuit Court of Appeals, in this proceeding, condones and sanctions the obvious frauds perpetrated and attempted to be perpetrated by Litton. Its effect is to give to Litton, the wrong-doer, all of the assets of the bankrupt estate to the exclusion of this petitioner.

The decision of the Circuit Court of Appeals is, therefore, in conflict with the repeated decisions of this Court, and of all equitable principles.

Buffum v. *Peter Barceloux*, 289 U. S. 227, 53 S. Ct. 539;
Mitchell v. *Commissioner*, 91 U. S. 206, 23 L. Ed. 302;
Dent v. *Ferguson*, 132 U. S. 50, 33 L. Ed. 242;
Randolph v. *Quidnick*, 135 U. S. 457, 34 L. Ed. 200;
Pomeroy's Eq. Jur. (3rd ed.), Vol. 1, Section 397.

Petitioner shows that she made an effort to diminish, from two hundred to one hundred pages, the printed record of *Smith, Trustee*, v. *Scott Litton*, in an effort to avoid unnecessary cost in the presentation of this petition; but Litton refused to make any agreement whatever concerning the diminution of the record.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court

to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 4378, Jean McNeil Pepper, Appellant, *vs.* Scott Litton, Appellee, in the matter of Dixie Splint Coal Company, Bankrupt; and that the said judgment of the United States Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

JEAN MCNEIL PEPPER,
By M. M. HEUSER,
ROBT. BURROW,
A. K. MORISON,
Counsel for Petitioner.

(1511)

FILED
OCT 4 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 39

JEAN McNEIL PEPPER

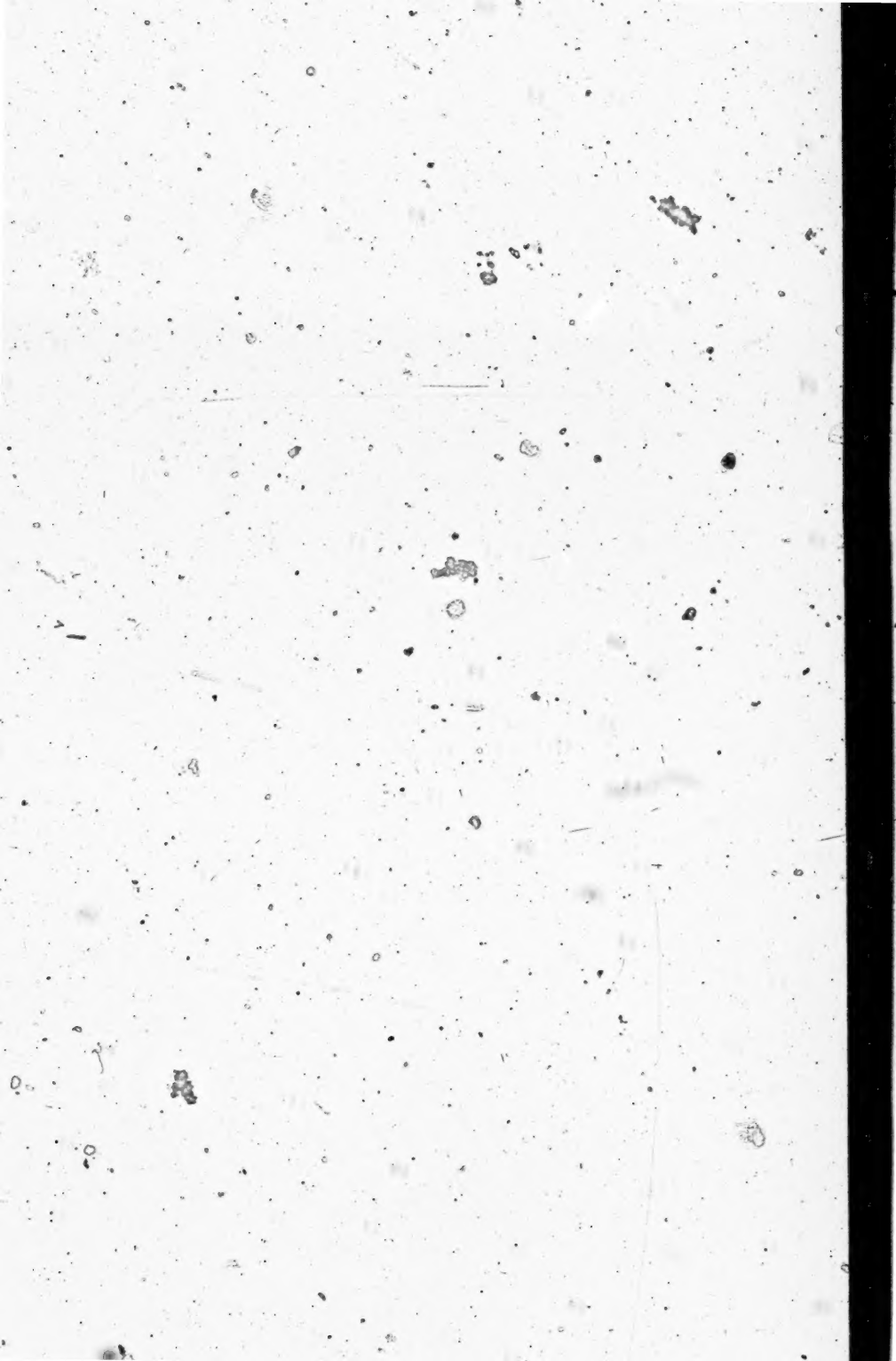
vs.

SCOTT LITTON

IN THE MATTER OF DIXIE SPLINT COAL COMPANY, BANKRUPT

BRIEF OF COUNSEL FOR PETITIONER

GEO. M. WARREN,
A. K. MORISON,
M. M. HEUSER,
R. TURNER MORISON,
Counsel for Petitioner.



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I.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit which accompanied the judgment complained of appears in the Record at page 407, and is also officially reported as follows:

Litton v. *Pepper*, 100 F. (2d) 830.

The two opinions of the District Court of the United States for the Western District of Virginia in this case are not officially reported, but appear in the Record at pages 53 and 122, respectively.

II.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 24c of the Bankruptcy Act as amended June 22, 1938, 52 Stat. 854 (11 U. S. C., Sec. 47c), which vests this Court with jurisdiction to review judgments, decrees and orders of the Circuit Courts of Appeals in proceedings under the Bankruptcy Act.

The jurisdiction to review by certiorari is granted by Section 240 of the Judicial Code (28 U. S. C., Sec. 347).

III.

STATEMENT OF THE CASE

The question to be decided in this case is whether the claim of Scott Litton, the respondent, for $33,468.89, shall be allowed for payment from the estate of Dixie Splint Coal Company, Bankrupt.

If the claim is allowed as a judgment it will consume all the assets of the estate, to the exclusion of petitioner, and all other common creditors; and, if it is allowed as a common claim, it will diminish, by more than three-fourths, the dividend which petitioner will receive.

The District Court, after consideration of the merits of Litton's claim, wholly disallowed it either as a secured, or as a common claim on the grounds: that the purported judgment is void upon its face; and the alleged account, on which the judgment was based, is both fictitious and fraudulent (R. 122).

The District Court was reversed by the Circuit Court of Appeals; but not upon a consideration of the merits or validity of Litton's claim, but because, the latter Court held, the decision of a Virginia state court in a suit by the trustee against Litton should be given the effect of allowing the claim in bankruptcy regardless of its manifest invalidity and fraudulent character.

The litigation results from the efforts of Litton to prevent the payment of a just debt due Petitioner from Dixie Splint Coal Company, bankrupt.

The established facts reveal a deliberate and legalistically planned scheme on the part of Litton, not only to use the fiction of corporate entity to escape liability, but, through his complete control of his now bankrupt corporation, to gather to himself all its assets. Litton's domination of the corporation was so complete that its acts are his acts. In the course of his opinion the District Judge said:

> "I speak of Litton *and* Dixie Splint Coal Company because they are in reality the same." (R. at p. 61.)

In 1931 a suit was begun by A. P. Pepper against Dixie Splint Coal Company, in the Corporation Court of the City of Bristol, Virginia, for an accounting of rents and royalties due him for a lease of coal lands. A judg-

ment for $9000.00, with interest and costs, was rendered against the corporation on February 19, 1934 (R. 214). During the pendency of this suit Pepper died, and petitioner, Jean McNeil Pepper, his sole devisee, was substituted in his place.

The patently fraudulent devices employed by Litton to escape contractual liabilities are described in the decision of the Supreme Court of Appeals of Virginia in *Pepper* v. *Dixie Splint Coal Co., et al,* 165 Va. 179, 181 S. E. 406, which resulted from an appeal by Pepper, from the decision of the trial court, that Litton was not personally liable for the debts there in question.

On June 2, 1933, when the suit in the Bristol court was approaching judgment, Litton sent his subservient secretary-treasurer of his corporation to the Clerk's Office of the Circuit Court of Russell County, Virginia, to confess judgment in his (Litton's) favor for $33,468.89 (R. 181-184). The confession of judgment was attempted without the express authority required by the Virginia law (Va. Code Sec. 6130). This appears from the record of the purported judgment (R. 181-184). Upon this ground the Circuit Court of Russell County, Virginia, expressed the opinion that the judgment was void (R. 153). For the same reason the Referee in Bankruptcy held the judgment void (R. 109). This holding was expressly approved by the District Court (R. 120).

On June 2, 1933, the day the void judgment was docketed, Litton caused execution to issue thereon; but no levy was made. Hence, no lien was acquired on the corporation's personal property.

On February 19, 1934, when petitioner obtained judgment against Dixie Splint Coal Company in the Bristol court, Litton falsely represented that his corporation intended to appeal from its judgment to the Virginia Supreme Court of Appeals. On this representation a stay of execution for ninety days, from February 19, 1934, was ordered on petitioner's judgment (R. 215).

On March 19, 1934, during the ninety-day stay period, Litton sued out a second execution on his purported judgment; and caused his execution on that day to be levied on all the tangible property of his company. But no sale was then advertised under his execution levy (R. 184; 254).

On May 31, 1934, after the expiration of the ninety-day stay period, petitioner sued out execution on her judgment against Dixie Splint Coal Company. It was levied on all the tangible property of the company on June 2, 1934 (R. 237, 238).

On the last named date, a deputy sheriff, obviously cooperating with Litton, advertised a sale to be made on June 14, 1934, to satisfy Litton's execution, which had been levied two and one half months previously. (R. 216, 217; 254, 255).

On June 13, 1934, the day preceding the advertised execution sale, petitioner filed her bill in the Circuit Court of Russell County, Virginia, alleging that the Litton judgment was void, and that the corporation did not owe Litton any sum (R. 210). Among other things, the bill prayed that the sale be enjoined; but, on account of the absence of the judge, the prayer for injunction was not acted upon.

On June 14, 1934, a purported sale was held, and Litton became the purchaser of all the tangible personal property of his corporation at the price of $3200.00 (R. at page 238).

Two days after the purported execution sale Litton caused the board of directors of his one-man corporation to adopt a resolution directing the voluntary bankruptcy of his Dixie Splint Coal Company, the bankrupt (R. 1). However, the petition was not filed until September 4, 1934, or seventy-nine or eighty days after the bankruptcy resolution (R. 1). During the eighty days delay Litton's lien under the levy he had made became more than four

months old; but petitioner's lien, under her levy of June 2, 1934, was less than four months old, and, therefore, not a lien in bankruptcy.

On June 16, 1934, Litton's company executed to Clinchfield Coal Corporation a release of the coal lease for the only coal property then being mined by it (R. 101). This was more than two months before the company filed its petition in bankruptcy; and on the same day the company by resolution determined to file its bankruptcy petition.

On June 21, 1934, Litton procured the incorporation of Dixie Beaver Coal Corporation, to which he sold all the tangible property he had purchased for $3,200.00 under his own void execution sale, and received therefor the fully paid capital stock of his new company in the par amount of $20,135.36 (R. 106).

On June 22, 1934, Litton's new corporation, Dixie Beaver Coal Corporation, obtained from Clinchfield Coal Corporation a lease covering the same coal lands which Dixie Splint Coal Company had released six days previously (R. 105, 106).

Commencing the last of March or the first of April, 1934, Litton, and, at his instance, Smith, his subservient secretary-treasurer, began making heavy withdrawals of cash from Dixie Splint Coal Company through their respective "personal" ledger accounts. From March 31 to May 31 Litton withdrew a total of $5,022.96. From April 30 to July Smith withdrew $4,833.32 (R. 79; 83).

These "personal" ledger accounts were found by the District Court to be both fictitious and fraudulent (R. at p. 127). Litton and Smith were regularly compensated for their services on the payroll, Litton receiving $500.00 per month (R. 91) and Smith, $250.00 per month (R. 87).

Thus the stage was set for the voluntary bankruptcy of the now bankrupt Dixie Splint Coal Company.

During the last ninety days the Dixie Splint Coal

Company was in business Litton and Smith together fraudulently withdrew practically all the cash of the bankrupt company, in a total sum sufficient to have paid the debt due petitioner.

By June 22, 1934, Litton's new corporation had all the personal mining machinery and property of the bankrupt company, and was operating the same leasehold estate which had belonged to, and had been operated by, the bankrupt Dixie Splint Coal Corporation only eight days before.

On June 15, 1934, the next day after the purported execution sale, the sheriff of Russell County with $3,200.00, the proceeds of the sale, in hand commenced interpleader proceedings. Petitioner, Litton, and Clinchfield Coal Corporation, which claimed a prior lien in the amount of $2,153.00 on the property sold, were made parties defendant (R. 237).

Litton answered, admitting the amount and priority of the claim of Clinchfield Coal Corporation, and that said claimant "is entitled to have its said lien paid and satisfied out of the proceeds of said sale" (R. 243, 244).

Pepper answered, refusing to assert any claim to the proceeds of sale but expressly saving her objections to the validity of the Litton judgment, saying:

> "Without prejudice to her rights and claims asserted in the Chancery cause of Jean McNeil Pepper, Executrix, etc. against Scott Litton, et als, now pending in the Circuit Court of Russell County, Virginia, the general subject of which is to set aside and have declared void the judgment under which the sale was made, from which M. C. Chafin, Deputy Sheriff for N. F. Castle derived the fund here in question, answers that she admits the priority of the lien asserted by Clinchfield Coal Corporation in the sum of Two thousand One hundred and Fifty three dollars ($2,153)." (R. 241).

This answer made by petitioner is the ground of the

"estoppel" subsequently attempted to be invoked by Litton against petitioner.

On September 4, 1934, eighty days after the resolution directing voluntary bankruptcy of Dixie Splint Coal Company, and two and one-half months after the company had ceased to do business, the said Company filed its voluntary petition in bankruptcy (R. 1). The first meeting of creditors was held on September 26, 1934; but petitioner was neither present, nor represented, because Litton had omitted her address from the bankruptcy schedules prepared and filed by him (R. 24).

At said meeting, P. H. Smith, secretary-treasurer of the bankrupt corporation, was elected trustee. I. M. Quillen, personal attorney for Litton and of counsel for the bankrupt, was selected as attorney for the trustee (R. 3, 4).

At this same meeting Litton filed a proof of claim asserting a first lien upon all the assets of the bankrupt by virtue of the supposed lien of a writ of *fieri facias* issued from his alleged confessed judgment, more than four months prior to the bankruptcy (R. 4, 5). The assets consisted of funds due to the bankrupt, which were to come into the trustee's hands for administration by the bankruptcy court. A fund of approximately $6,000.00 constitutes the present estate (R. 117).

On October 6, 1934, Pepper, in aid of her pending chancery suit, filed in the Circuit Court of Russell County a motion to quash the Litton judgment. Litton opposed the motion on the ground of the bankruptcy of Dixie Splint Coal Company, the judgment-defendant; and, contended that such an attack on his alleged judgment could not be maintained "except in the name of the Trustee" (R. 230, 231). On October 15, 1934, Pepper filed a petition in the bankruptcy matter, praying that the trustee be directed to contest the validity of the Litton judgment (R. 271). On October 17, 1934, the referee entered an

order granting the relief prayed for by petitioner (R. 270).

Mr. Quillen, who was then counsel for both the trustee and Litton, immediately excepted to this action of the referee on the ground "that Mrs. Pepper is not entitled to the relief asked in her petition because she has filed no proof of claim in bankruptcy", and offered to resign as counsel for the trustee (R. 275).

The referee reheard the matter on November 8, 1934, on which date Pepper filed her general proof of claim (R. 19). At this hearing Litton's counsel again opposed an attack on the confessed judgment, this time on the stated ground "that Jean McNeil Pepper is estopped to contest the validity of the judgment of Scott Litton by reason of her acts and conduct in relation thereto" (R. 22).

Petitioner's answer in the interpleader suit, hereinbefore quoted, was placed in evidence before the Referee; and it is the basis of the estoppel pleaded in the bankruptcy court (R. 23).

New counsel had been selected for the trustee, and had filed a petition asking for permission to institute a new and independent suit in the Circuit Court of Russell County for the purpose of testing the validity of the confessed judgment (R. 25).

On December 18, 1934, after hearing argument of counsel, the referee entered an order directing the trustee's counsel to institute proceedings in the Circuit Court of Russell County "for the purpose of testing the validity of the judgment" (R. 188-190).

By this order the Referee necessarily overruled the contention of Litton that either Pepper, or the trustee, were estopped to question the validity of the confessed judgment. Litton sought no review of the order.

Prior to the date of the commencement of proceedings by the trustee, Litton purchased, or attempted to purchase,

and to have withdrawn every unsecured claim against the bankrupt except the claim of Pepper (R. 303).

On January 10, 1935, the trustee filed in the Circuit Court of Russell County a motion to set aside the confessed judgment on the ground that same was void upon its face. A copy of the motion was served upon Litton, the judgment-plaintiff (R. 178). The attack thus made was not collateral, but direct, and one that could, therefore, be maintained only by a party to the judgment (See *Wallop's Admr.* v. *Scarburgh*, 5 Gratt. 1; 15 R. C. L. 659).

However, the state court erroneously decided that the right of the trustee to attack the validity of the Litton judgment was a right acquired under section 70e of the Bankruptcy Act (R. at 154). This section invests the trustee with the right to avoid any *transfer of property* by the bankrupt which any *creditor* might have avoided. The court then proceeded, over the objection of the trustee, to undertake to determine who were the creditors of the bankrupt estate, and who would benefit by the success of the trustee's suit. The court held, contrary to the actual facts, that Pepper was the only creditor of the bankrupt estate, and that the trustee was attempting to exercise her rights (R. at 156, 157). At this time no unsecured claims had been allowed against the estate, and time yet remained in which to file proofs (R. 321-327). Subsequently, on April 23, 1935, several unsecured claims were allowed (R. 32-34). Pepper's unsecured claim had been excepted to and was not allowed until three years later, on February 4, 1938 (R. 116).

The State court further held that Pepper's answer in the interpleader suit had "treated" the execution sale as a valid sale, and that such treatment amounted to the "recognition" of the validity of the Litton judgment.

From these manifestly erroneous findings upon extraneous matters beyond the court's jurisdiction, and upon these false premises, the court proceeded to the conclusion that the trustee in bankruptcy was "estopped", at that

time, to have the Litton judgment decreed invalid, although the court found the judgment to be utterly void upon its face (R. 153).

The trustee appealed to the Supreme Court of Appeals of Virginia (R. 143). That court affirmed the lower court's holdings. *Smith* v. *Litton*, 167 Va. 263, 188 S. E. 214.

On December 18, 1934, Pepper excepted to the allowance of Litton's claim in bankruptcy, both on the ground that the validity of the judgment was in question, and that the amount claimed was never due and owing from the bankrupt to Litton (R. 6).

On February 22, 1937, the bankruptcy matter came on again to be considered by the referee. The referee, without entering a specific order to that effect, dismissed the exceptions to Litton's claims and allowed same as a secured claim.

On April 22, 1937, the District Court, on review petitioned for by Pepper, reversed the referee and remanded the proceedings with directions to pass upon the objections to Litton's claim filed by Pepper (R. 52).

In a written opinion the District Court reviewed the history of the litigation, and pointed out the frauds Litton was attempting to perpetrate upon Pepper and upon the bankruptcy court. The court specifically held that the duty to administer the estate of the bankrupt, in the custody of the bankruptcy court, was in such court, and was a right and duty that could neither be lost nor delegated (R. 53-66).

On February 4, 1938, after hearing evidence, the referee entered an order holding:

(a). That the Litton judgment was void;

(b). That the Litton claim was good as a common or unsecured claim;

(c). That Pepper was estopped to rely upon her ob-

jections to Litton's claim, and that same would be allowed as a secured claim;

(d). That Pepper was barred by laches and estoppel from seeking an appraisal of the bankrupt's property purportedly sold to Litton at the execution sale under the void judgment;

(e). That Litton's exceptions to the allowance of Pepper's claim should be overruled and her claim allowed as a general or unsecured claim (R. 107-116).

Litton did not seek review of the referee's holdings that were adverse to him, that is, that the confessed judgment was void, and that his objections to Pepper's claim be overruled. These holdings thus became final.

Pepper, however, sought review of the holdings that were adverse to her (R. 117-120). On June 23, 1938, the District Court entered an order sustaining her contentions and disallowing Litton's claim either as a secured claim or a general claim (R. 120, 121).

In a written opinion the court again reviewed Litton's fraudulent efforts to defeat an honest debt and to take to himself all the assets of the bankrupt. His claim was disallowed, the opinion shows, because the purported judgment on which it was based was utterly void, and because the alleged account on which the judgment had been confessed was fictitious and fraudulent (R. 122-132).

Litton appealed to the Circuit Court of Appeals for the Fourth Circuit from the order of the District Court disallowing his claim (R. 403).

On January 10, 1939, the Circuit Court of Appeals reversed the order of the District Court and remanded the cause "with instructions to give effect to the decision of the State Court, and for further proceedings in accordance with the opinion of the Court filed herein" (R. 413).

On June 5, 1939, this Court on the petition of Jean McNeil Pepper granted certiorari. (R. 460).

IV.

ASSIGNMENT OF ERRORS

Petitioner relies upon the errors specified in the Petition for Writ of Certiorari at pages 10 to 13, that the Circuit Court of Appeals for the Fourth Circuit erred in reversing the decree of the District Court of the United States for the Western District of Virginia, erroneously deciding, in effect:

First, that the bankruptcy court did not have exclusive, non-delegable jurisdiction to adjudge whether the claim of Scott Litton should be allowed, or disallowed, for payment from the bankrupt estate in custody of the bankruptcy court, ~~and disallowing Litton's claim and in thereby permitting the consummation of an obviously fraudulent scheme by use of the processes of the bankruptcy court.~~

Second, that a court of bankruptcy will permit its processes to be used in consummation of an obviously fraudulent scheme; or that it will lend its aid to one who is proved guilty of conduct in violations of fundamental conceptions of equity jurisprudence.

V.

ARGUMENT AND AUTHORITIES

1.

THE BANKRUPTCY COURT HAS EXCLUSIVE, NON-DELEGABLE JURISDICTION OF QUESTION AT ISSUE.

The question is whether the Circuit Court of Appeals erred in reversing the decree of the District Court, which adjudged:

"That the claim of Scott Litton in the sum of $33,468.89 is not a valid debt owing by the bankrupt either as a secured claim based on his purported judgment or as a general or unsecured debt and the same is hereby disallowed." (R. 121).

If Litton's claim is disallowed, then the trustee is directed by the District Court to

"take appropriate and necessary steps to recover for the benefit of the bankrupt estate such property or the value of such property as was sold to Scott Litton on June 14, 1934, under an execution issued on said Litton's void judgment against the bankrupt." (R. 121).

The decision of the District Court is clearly an adjudication upon a "proceeding in bankruptcy" over which the courts of bankruptcy exercise jurisdiction exclusive of that of all other courts.

U. S. Fidelity & Guaranty Co. v. *Bray*, 225 U. S. 205, 32 S. Ct. 620, 56 L. ed. 1055.

United States v. *Wood*, 290 F. 109, affirmed 263 U. S. 680, 44 S. Ct. 134.

In *U. S. F. & G. Co.* v. *Bray*, *supra*, this Court, in construing section 2 (2) of the Bankruptcy Act (11 U. S. C., sec. 11), held:

"We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankrupcy' is intended to be *exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims,* the reduction of the estates to money, and its distribution, *the determination of the preferences and priorities to be accorded to claim presented for allowance and payment* in regular course * * *."

In this case the Circuit Court of Appeals held that neither it nor the District Court had jurisdiction to pass upon the merits of Litton's claim because of the "binding effect" of a decision of the Circuit Court of Russell County, affirmed by the Supreme Court of Appeals of Virginia, in a suit by the trustee against Litton (*Smith, Trustee* v. *Litton*, 167 Va. 263, 188 S. E. 214). The Circuit Court of Appeals did not hold that Litton's claim should be allowed on its merits, either as a secured or an unsecured claim. On the other hand, that Court left undisturbed, and tacitly, at least, approved the finding of the District Court that the claim is invalid and fraudulent (R. 408-412). However, the effect of the decision is to allow the claim as a secured claim.

The expressed reason for the decision of the Circuit Court of Appeals is that the holding of this Court in *U. S. F. & G. Co.* v. *Bray, supra*, and other cases relied on by petitioner, are not applicable because they

> "* * * do not envision the situation which results when the trustee in bankruptcy has sought and obtained the decision of a *competent* state tribunal upon the *validity* of a disputed *claim* or judgment *against the* (*bankrupt*) *estate*". (Italics supplied).

Herein, we submit, is the error in the court's decision. *No state tribunal, nor any court other than the court of bankruptcy, is competent to pass upon the validity and allowability of a claim presented for payment in the bankruptcy court.*

That is the exact holding of this court in the *Bray case, supra.* It is well established that the jurisdiction to allow, disallow and reconsider claims presented in the bankruptcy court cannot in any way be waived, abandoned, delegated or surrendered, by the bankruptcy court, or by action of its officers.

U. S. F. & G. Co. v. *Bray, supra.*

Isaacs v. *Hobbs Tie & Timber Co.*, 282 U. S. 739, 51 S. Ct. 270, 75 L. ed. 645.

Gross v. *Irving Trust Co.*, 289 U. S. 342, 53 S. Ct. 605, 77 L. ed. 1243.

In the *Bray* case one of the claimants in bankruptcy had been expressly authorized by the referee to institute litigation in another court. In passing upon the effect of this authorization, this Court held:

> "Of the fact that the suit was begun in the Circuit Court with the express leave of the Court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal."

In *Isaacs* v. *Hobbs Tie & Timber Co., supra,* the trustee invoked the jurisdiction of another court as to the disposition of the bankrupt's property, and the validity of a claim against it. It was contended that the trustee had thus estopped himself to later set up the exclusive jurisdiction of the bankruptcy court. This court held:

> "There is no merit in this contention. The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the Court's officers to oust it by surrender of property which has come into its possession (citing cases). Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

It follows, therefore, that the decision of the Circuit Court of Russell County, Virginia, can not be accorded the effect of ousting the bankruptcy court of its jurisdiction to pass upon the allowance of Litton's claim, even though the referee authorized the suit to be brought in the state court.

It is obvious that the Circuit Court of Appeals was led to its erroneous decision by confusing the question here involved, which, as has been hereinbefore pointed out, is distinctly a "proceeding in bankruptcy" over which the courts of bankruptcy exercise exclusive jurisdiction, with "controversies" between trustees and "adverse claimants" over which the courts of bankruptcy and other courts exercise concurrent jurisdiction.

In holding that the state court had "jurisdiction to hear and determine the matter brought before it by the independent suit of the trustee", and "that the binding effect of the decision of the court is equally well established", the court cited the following authorities:

> *Mays* v. *Fritton*, 20 Wall. 414;
> *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526;
> *Winchester* v. *Heiskell*, 119 U. S. 450;
> *Davis* v. *Friedlander*, 104 U. S. 570;
> *Linstroth Wagon Co.* v. *Ballew*, 5 Cir., 149 F. 960;
> *Herman* v. *Cullerton*, 7 Cir., 13 F. (2d) 754; and
> Sections 2170, 2182 and 2183 of *Remington on Bankruptcy.*

Examination shows that every one of the cases cited deals with a contest over the title to a fund, or property, in the custody of a state court, in which the trustee intervened to assert the title of the bankrupt. In other words, the cases are

> "controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees * * *". *Bankruptcy Act*, sec. 23(a), 11 U. S. C., 46(a).

The sections of *Remington* cited simply refer to other situations, such as suits to recover property fraudulently

and preferentially conveyed by the bankrupt, in which the bankruptcy courts and other courts are granted concurrent jurisdiction by the Bankruptcy Act.

Clearly, the question before this Court is not a controversy between the trustee and an adverse claimant. It is simply the question of the allowability of a claim in bankruptcy. One claiming to be a lienholder as to property or funds in the custody of the bankruptcy court, as Litton is doing here, is not an "adverse claimant", and the bankruptcy court has exclusive jurisdiction to pass upon his claim.

Ex Parte City Bank, 3 How. 292, 11 L. ed. 603.
Norton v. *Boyd*, 3 How. 426, 11 L. ed. 664.
Carter v. *Hobbs*, 92 F. 594, and note.
Remington on Bankruptcy (4th ed.), sec. 2169.

It is equally clear that the proceeding in the state court was not a controversy between the trustee and an adverse claimant concerning property acquired or claimed by the trustee. It was simply a motion by the trustee, *in exercise of the rights of the bankrupt*, to set aside a purported judgment against the bankrupt on the sole ground that it was void upon its face. No property was sought to be recovered or retained by the trustee. The only judgment sought was a ruling upon the validity of the judgment upon its face. A lien claim had previously been filed by Litton in the bankruptcy matter, based upon the purported judgment, seeking allowance and payment from funds in the hands of the trustee.

2.

THE DECISION OF THE STATE COURT IS OF NO EFFECT IN THE BANKRUPTCY COURT.

The doctrine of res judicata, on which the Circuit Court of Appeals summarily disposed of the case, can in no

event be applicable unless the issue in the state court is shown to be identical with the issue presently before the bankruptcy court.

> "It is well settled that the principle of res judicata is only applicable to the point adjudged and not to points only collaterally under consideration, or incidently under cognizance, or only to be inferred by arguing from the decree." *North Carolina R. Co.* v. *Story*, 268 U. S. 288, 45 S. Ct. 531, 69 L. ed. 959.

The state court did not attempt to pass upon the validity of Litton's claim in bankruptcy. The Judge of the Circuit Court of Russell County in the course of his written opinion said:

> "This court does not undertake to pass upon the validity of any claim made or to be made against the bankrupt, nor to the disposition to be made of the bankrupt estate." (R. 155.)

By its decision in this case, the Circuit Court of Appeals has added to the actual holding of the state court and accorded to it an effect which that court did not intend, but expressly disavowed.

It is also clear that the referee did not intend to submit to the state court the question of the allowability of Litton's claim in bankruptcy. Nor, did the referee intend to submit to the state court for decision the question of whether Pepper was estopped, in the bankruptcy court, from challenging the validity of Litton's claim. Ten days before the referee decided to authorize a suit by the trustee in the state court "for the purpose of testing the validity of the (Litton) judgment", Litton's counsel contended before the referee that Pepper was estopped from challenging the lien of Litton's judgment "in any sort of proceeding". The contention was:

> "Counsel for Scott Litton * * * have already heretofore taken the position that Scott Litton's lien is a

valid one and that on account of certain waivers of rights and estoppel, *of which evidence has been presented to the Referee,* Litton's lien can not be successfully challenged in any sort of proceeding and that, therefore, in the exercise of the Referee's discretion the Referee should declare Scott Litton's lien valid and allow it as a preferred claim." (R. 27-28.)

This contention was considered, and was overruled by the Referee's order of December 18, 1934 (R. 188-190). At this time not only had the trustee's counsel questioned the allowance of Litton's claim on the ground that the judgment on which it was based was void. Pepper had filed formal exceptions to the allowance of the claim not only on this ground, but also that "the same does not constitute a common claim, since the amount claimed under said judgment was never due or owing to the said Scott Litton" (R. 6; 188).

Thus, before the referee could allow Litton's claim, it was necessary to decide, first, whether the purported judgment was valid; and, second, whether the claim on which the judgment was based was fraudulent in its entirety.

A decision that the judgment was either void or valid on its face would not determine the allowability of the claim. If it were found void, then the claim would have to be passed upon as a common claim. If the judgment were found valid on its face, it would yet be subject to attack on the ground that it was voidable because of fraud or collusion.

In re Continental Engine Co., 234 F. 58.

Chandler v. *Thompson*, 120 F. 940.

The single question presented to the state court for decision was whether the Litton judgment was *void on its face* (R. 178-181). This question involved the construction of a Virginia statute (Code of Va., sec. 6130(a), and

was one of first impression in the state. Hence, resort was had to a state court. The opinion of the Judge of the trial state court shows that this was the single question presented by the trustee's motion.

> "This is a proceeding to set aside and vacate a judgment confessed in the Clerk's Office of this court, by P. H. Smith, Secretary-Treasurer of Dixie Splint Coal Company, Inc., in favor of Scott Litton, a director and the President of said Corporation, on the 2nd day of June, 1933, for the sum of $33,468.89, for the alleged reason that said judgment was void and for the quashing of executions issued thereon.
>
> No question is made as to the validity or bona fides of defendant's claim, upon which the judgment was attempted to be confessed, nor as to the status of said corporation as to solvency or insolvency at the time of the alleged confession of judgment, nor as to the right of said Scott Litton to obtain a lien in his favor as against the other creditors of said corporation, *but the grounds relied upon to sustain the contention that said judgment is void in that it was not confessed under authority nor in the manner required by law.*" (R. 149).

But, as the opinions of the state courts show, they declined to adjudicate whether the judgment was void or valid. Thus, insofar as the bankruptcy court was concerned, the proceedings in the state courts were futile.

The actual holding of the state court, that is, that the trustee and Pepper were estopped to challenge the validity of the Litton judgment in the state court, can be given no effect in the bankruptcy court for four separate and distinct reasons:

(a). The state court was not legally competent to adjudge that anyone is estopped to contest the allowability of a claim in the bankruptcy matter. Otherwise it would be possible to oust the bankruptcy court of its

exclusive jurisdiction over the administration of the bankruptcy estate in its custody.

(b). The bankruptcy court had previously decided, upon the same evidence that was later before the state court, that neither Pepper nor the trustee were estopped to challenge the Litton claim *in the bankruptcy court.*

(c). The state court did not attempt to render a judgment having the effect of allowing a claim in the bankruptcy matter; but, conscious of the limitations upon its power in that respect, expressly disavowed such a purpose.

(d). The whole decision of the state court is not merely erroneous; it is invalid because the court exceeded its jurisdiction. As a basis for its holding the state court first attempted to adjudicate that Pepper was the only common creditor in the bankruptcy matter. This was contrary to the actual facts. Pepper's claim was not even allowed in the bankruptcy matter until three years after the suit in the state court (R. 107, 116). At the date of the state court's decision, time yet remained in which claims could be filed (R. 327). Several claims that had been filed as preferred claims were subsequently allowed as common claims (R. 32-34). The court then proceeded to hold that Pepper would be the only person to be benefited by the success of the trustee's suit; that she would be estopped to attack the Litton judgment; and that, therefore, the estoppel would be applied against the trustee.

The state court thus exceeded its jurisdiction.

Eau Clair Nat'l Bank v. *Jackman*, 204 U. S. 522, 27 S. Ct. 391, 51 L. ed. 596.

Miller v. *N. O. Acid & Fertilizer Co.*, 211 U. S. 496, 29 S. Ct. 176, 53 L. ed. 300.

These cases deal with suits to recover preferential transfers over which state courts have jurisdiction concurrent with the federal district courts. The cases hold that the legal rights of a trustee, suing in a state court, are not varied in the slightest degree by the probable manner in which the assets of the bankrupt estate may be administered if the trustee's suit is successful. The ascertainment of who are or may be the creditors in bankruptcy was held to be a question "depending on independent considerations exclusively cognizable in the bankruptcy court."

3.

PEPPER IS NOT ESTOPPED TO ASSERT THE INVALIDITY OF LITTON'S JUDGMENT.

As hereinbefore pointed out, prior to the commencement of the proceeding in the state court, the referee had held that Pepper was not estopped to assert the invalidity of the Litton judgment in the bankruptcy court. Even if that question can now be again considered in the bankruptcy court, it is clear that the doctrine of estoppel has no application to the circumstances of this case.

The purported judgment under which Litton claims is no judgment at all. It is void upon its face, and there is now no serious contention in the case either that the judgment is valid or that it is merely voidable. Such a contention could not be considered. The referee affirmatively held that the judgment was void upon its face (R. 109). No review of this holding was sought by Litton. It has thus become final.

In re L. & R. Wister & Co., 237 F. 739, Certiorari denied *Shimer* v. *Wister*, 244 U. S. 652, 37 S. Ct. 650, 61 L. ed. 1372.

A judgment void upon its face, as distinguished from a voidable judgment, is no judgment at all but a mere

nullity. It may be assailed in any court by anyone at any time that a claim is made or a right asserted under it. This principle is too well known and too well established to require citation of authority for its support.

The right to object to a lack of jurisdiction, or legal power, in the official or tribunal rendering a judgment cannot be lost in any manner.

> "Neither the consent of the parties nor waiver, nor acquiescence can confer it (jurisdiction), nor can the right to object for a want of it be lost by acquiescence, neglect, estoppel or any other manner."
>
> *Shelton* v. *Sydnor*, 126 Va. 629.
> *School Trustees* v. *Stocker*, 42 N. J. L. 116.
> *Springer* v. *Shavender*, 118 N. C. 33, 23 S. C. 976.
> *O'Brien* v. *People*, 216 Ill. 354, 75 N. E. 108.

The only circumstance in which one may be estopped to assert that a judgment void upon its face *is* void, is when the person attacking the judgment is the one at whose instance the void judgment was rendered.

> "Even where the circumstances are such as might otherwise afford sufficient grounds for successful attack collaterally upon a judgment or decree, the conduct of a party may be such as to estop him from availing himself of those grounds. The general rule has been laid down and is supported by numerous decisions, *that a party at whose instance a judgment was rendered* is not entitled in a collateral proceeding to contend that the judgment is invalid. *The reason or principle on which these decisions rest is not technically the doctrine of estoppel in the ordinary signification and acceptance of the term*, but the principle that a person, *having invoked the jurisdiction of a court, and submitted himself thereto*, cannot be heard thereafter in a collateral proceeding, to question the jurisdiction *so invoked.* * * *." (Italics supplied). (*Freeman on Judgments* (5th Ed.) Vol. 1, at p. 640).

Obviously, this principle has no application to the present case. Pepper had nothing whatever to do with the proceeding in which the alleged judgment was confessed. She had neither notice nor knowledge of it. Upon every occasion she has *expressly denied* the authority of the Clerk of the Circuit Court of Russell County to enter the alleged judgment.

For this reason alone, it is clear that Pepper is not "estopped" to assert that the Litton judgment is utterly void.

4.

THIS COURT SHOULD REFUSE, BECAUSE OF LITTON'S FRAUDULENT CONDUCT, TO INTERFERE ON HIS BEHALF OR TO AWARD HIM ANY REMEDY.

This court as a court of bankruptcy is likewise a court of equity. 11 U. S. C., sec. 11.

The decision of the Circuit Court of Appeals approves or condones the obviously fraudulent scheme of Litton to prevent a bona fide creditor from collecting a just debt. It condones the use of the processes of the bankruptcy court to consummate the scheme. It awards to the wrongdoer all the assets of the bankrupt estate upon an utterly void judgment attempted to be confessed on a fraudulent and fictitious account. It deprives petitioner, a bona fide creditor, of any satisfaction from the bankrupt estate.

This shockingly inequitable result is reached by the application, or rather misapplication, of the equitable doctrine of estoppel which is relied on by Litton.

We have hereinbefore demonstrated that as a matter of law and as a matter of fact Litton is entitled to no part of the bankrupt estate, and that petitioner is entitled to participate in the distribution of the estate.

We submit that it is in violation of all principles of equity jurisprudence to permit the unjust result accomplished by the decision of the Circuit Court of Appeals in this case.

A court of equity will not permit the use of its facilities to a wrong-doer. This principle is expressed by the ancient maxim:

"He who comes into equity must come with clean hands."

Litton's frauds and deceptions are deliberate and each one was a step in a general plan which can now be viewed as a whole. The fraudulent scheme relates directly to the subject matter of the present controversy.

The first rule of estoppel is that the one claiming the benefit of the estoppel must have been free from fraud in the transaction. Otherwise no equity will arise in his favor.

Pomeroy's Equity Jurisprudence, (3rd Ed.), sec. 513.

Litton's frauds and deceptions are proven by the record in this case. At the risk of being repetitious, we again point out the various steps in the fraudulent plan, which achieves its intended result if the judgment of the Circuit Court of Appeals is allowed to stand.

1. The three fictitious entities, a partnership and two corporations with the same name, employed by Litton to hinder, delay and defraud A. P. Pepper from collecting rents and royalties due under a lease. Pepper, the lessor, had no way of knowing of the existence of these three distinct companies until the cross bill filed by Litton in the initial proceeding in this litigation. See *Pepper* v. *Dixie Splint Coal Co.*, 165 Va. 179.

2. The judgment Litton attempted to have his sub-

servient office man confess against the bankrupt in favor of himself (Litton). On June 2, 1933, when the proof in Pepper's suit for an accounting was practically completed, Litton, in anticipation of the outcome of the suit, attempted a confession of judgment against the bankrupt and in favor of himself, in the amount of $33,468.89. This attempted confession of judgment was void, however, because of a non-compliance with the Virginia Statute (Code Section 6130A). The amount of this attempted confession of judgment, namely, $33,468.89, was made up in the main, of an unpaid "salary" item of $26,041.84, allegedly due Litton's subservient office man, P. H. Smith, which was assigned to Litton, in consideration of one dollar "and other valuable considerations." (R. 89). On cross examination (R. 88) *Litton could not recall or itemize a single item or "valuable consideration"* which he gave Smith in return for the assignment of a $26,041.84 claim against the Bankrupt;

3. The false explanation of Litton's reasons for obtaining the confessed judgment, on June 2, 1933, namely, that Pepper, by her attachments, executions, etc., was responsible therefore when Pepper's judgment was not obtained until February 19, 1934;

4. The fact that Litton, although he sued out executions on his void judgment, withheld levy thereunder from June 2, 1933, until March 19, 1934;

5. The false representations made by Litton to the Bristol court that he intended to apply for an appeal and supersedeas to the Pepper's $9,000.00 judgment, and upon which he stayed execution of Pepper's judgment from February 19, 1934, until May 19, 1934;

6. The suing out and levying of an execution from his purported judgment by Litton during the stay period on Pepper's judgment; and the advertisement of sale under

Litton's levy by the sheriff on the same day that Pepper's execution was placed in the sheriff's hands for levy;

7. The purchase by Litton at the execution sale of all the property of the bankrupt for $3200.00 on June 14, 1934, and the resale of the property to another Dixie Company organized by Litton for $20,135.36;

8. The delay in filing a voluntary petition in bankruptcy for the bankrupt from June 16, 1934, until September 7, 1934, or seventy-nine days, during which period Litton's levy lien became of more than four months' standing, and Pepper's levy lien was less than four months' standing;

9. The unexplained failure of Litton to give the address of Pepper, which was well known to him, in the schedules of the bankrupt, thus preventing Pepper from participating in the first meeting of creditors;

10. The election, at the first creditors' meeting, of P. H. Smith, Litton's subservient office man, as trustee in bankruptcy; and the selection by the trustee of Litton's and the bankrupt's counsel as attorney for the trustee;

11. The cancellation on June 16, 1934, of bankrupt's Clinchfield lease; and the action of Litton in obtaining a new lease from Clinchfield of the same premises to another "Dixie" Company on June 22, 1934, thus giving to Litton the same lease-hold premises and the same mining equipment, books and office furniture and supplies on June 22, 1934; and permitting him to continue business on the same premises with the same equipment that the bankrupt owned on the date of the sale, namely, June 14, 1934, and at a net cost of only $1,047.00 ($3200.00 less $2153 paid on an admitted debt).

12. The so-called "personal" ledger salary accounts

of Litton and Smith set up to evade federal income tax due from Dixie Splint Coal Company, and to be utilized as a shield against bona fide creditors in the event of financial difficulties of the corporation;

13. The absurd contention that Smith, the secretary-treasurer of the bankrupt, permitted his unpaid salary account to reach the total of $26,041.84 in five years;

14. The transfer of Smith's fictitious ledger balance to Litton for no consideration; the attempted confession of judgment on Litton's fictitious ledger balance, made up largely of the transfer from Smith at a time when Pepper was reducing her bona fide claim against Dixie Splint Coal Company to judgment;

15. The false testimony of Litton that the entire sum of $33,468.89 was made up of unpaid salary balances due to him alone;

16. The action of Litton in attempting to purchase or have withdrawn every claim against the bankrupt with the sole exception of Pepper's claim;

17. The action of Litton and Smith of withdrawing by means of their fictitious accounts of all the monies of Dixie Splint Coal Company on the eve of its planned bankruptcy.

We submit that the District Court was fully justified when it said:

> "It would be a strange situation if this Court, or any other, in a matter pending solely before it, were compelled to confess itself powerless to prevent the perpetration of such gross and obvious fraud as has been sought to be accomplished here." (R. 61).

In a similar case this Court held that it was not ren-

dered powerless by the doctrine of estoppel to prevent the consummation of a fraudulent scheme in the bankruptcy court.

Buffum v. *Peter Barceloux Co.*, 289 U. S. 227, 53 S. Ct. 539.

VI.

CONCLUSION

We submit that for the reasons assigned the decision of the United States Circuit Court of Appeals, Fourth Circuit, rendered January 9, 1939, is erroneous and should be reversed. For the same reasons the judgment of the District Court of the United States for the Western District of Virginia, rendered June 23, 1938, is plainly right and should be affirmed.

R. Turner Morison,
M. M. Heuser,
Geo. M. Warren,
A. K. Morison,
Counsel for Jean McNeil Pepper, Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 39

JEAN McNEIL PEPPER

vs.

SCOTT LITTON

IN THE MATTER OF DIXIE SPLINT COAL COMPANY, BANKRUPT

REPLY BRIEF FOR PETITIONER

GEO. M. WARREN,
A. K. MORISON,
M. M. HEUSER,
R. TURNER MORISON,
Counsel for Petitioner.

MAY IT PLEASE THE COURT:

Respondent, in his brief, makes the contention that the question for decision in this case is entirely different from the questions on which the Court granted a writ of certiorari, and challenges the accuracy of petitioner's statement of the facts of the case. Hence this reply brief.

THE FACTS

Counsel for respondent asserts that petitioner's statement of the case "contains so many incorrect, incomplete and misleading statements, * * * that it is necessary to restate the case * * * ." Then follows a purported restatement of part of the facts of the case, but not a single instance is pointed out wherein petitioner's statement of facts is not supported by the record.

Petitioner welcomes this invitation to a closer scrutiny of the record and the facts of the case.

The restatement which respondent found it "necessary" to make is for the most part an argumentative presentation of parts of the facts, or misleading statements of isolated events. In some instances actual misstatements occur.

As characteristic of this method of attempting to avoid the force and implications of the established facts of the case, we call the Court's attention to the following instances:

1. On page ... of respondent's brief it is asserted, or rather argued:

> "It also appears from the Pepper petition asking the Bankruptcy Court to direct the Trustee to intervene in the State Court for a decision as to the validity of the Litton execution that Pepper knew on May 25 (R. 272), that the Litton execution had been levied upon the property, and that *Pepper thus had twenty days within which to prepare the bill and present the prayer for injunction to any Judge in the State of Virginia.*"

The record does *not* show that Pepper had twenty days within which to prepare a bill and present the prayer for an injunction to restrain the *sale* under an execution from Litton's void judgment. The sale was first advertised on June 2 and was held on June 14 (R. 216, 217). Pepper's petition in the bankruptcy matter, referred to by respondent, shows that on May 25, 1934, she first learned that an execution on Litton's void judgment had been *levied*. It would have been impossible at that time for her to have had knowledge of a sale under the levy for the simple reason that a sale had not then been advertised. There is nothing in the record to show that Pepper had any knowledge of the advertised sale until June 13, 1934, the day before the sale. (R. 210). Her attorneys naturally undertook to commence suit in the court having general jurisdiction in the county where the sale was to be held.

2. On page ... of respondent's brief it is asserted that Pepper's suit in Russell County against Litton was dismissed on her motion on February 15, 1935, "which was before the trial in the independent proceedings (by the trustee against Litton) which was had on February 21, 1935." The intended inference evidently is that Pepper abandoned her suit not because of the pendency of the trustee's action, but for some other reason. The record shows that the trustee's action was commenced by the filing of a motion on January 10, 1935, returnable February 4, 1935 (R. 178 and at 180). On February 15, 1935, the day on which Pepper dismissed her suit, a demurrer was filed by Litton to the trustee's motion, which was overruled by the court (R. 190, 351). Litton thereupon filed a plea to the trustee's motion (R. 191). Evidence on the plea was not heard until February 21. But, at the time Pepper dismissed her suit against Litton, the court, by overruling Litton's demurrer in the trustee's suit, had held Litton's judgment to be void on its face.

3. On page .... of the respondent's brief it is stated that on November 1, 1934, an agreed order was entered in the interpleader suit in Russell County directing that "the $961.50, the balance of the proceeds of the sale under the Litton judgment and execution, be paid to the trustee in bankruptcy." It was, of course, lawful and proper that the trustee in bankruptcy have custody of this fund. Respondent evidently intends the inference to be drawn from this statement that Pepper, by agreeing to such an order at this time, "recognized" the validity of the Litton judgment, execution, levy and sale. However, he fails to mention the fact that the order of November 1, 1934, was set aside ten days later by the Circuit Court of Russell County (R. 257), and that the trustee received the fund in question from the clerk of the state court more than two years later, in February, 1937, and not by virtue of any "agreed order" (R. 36).

4. On page .... of respondent's brief it is asserted that the referee did not overrule Litton's plea of estoppel, "but on the contrary referred the question to the Circuit Court of Russell County for decision." No reference is made to the record to support this assertion. The referee's order of December 18, 1934, (R. 188-190, considered together with Litton's objections to the entry of the order (R. 126-128), shows beyond question that the evidence on which the alleged estoppel was based was considered by the referee. Litton's contention before the referee, as set out in his formal objections, was that his judgment could not be successfully challenged "*in any sort of proceeding*" because of the alleged estoppel, and that, therefore, the referee should then and there "declare Scott Litton's lien valid and allow it as a preferred claim." (R. 28). The referee's order, which was entered ten days after the filing of Litton's objections raising the question of estoppel, recites that

> "at that time the referee heard argument of counsel * * * and took time to consider the matter as to whether or not an order should be entered granting the prayer of the petition." (R. 189).

By authorizing the commencement of a new and independent proceeding by the trustee to test the *validity* of the Litton judgment, we assert that as a plain matter of fact the referee necessarily overruled Litton's objections to the entry of such an order. The record shows that Litton's chief objection to the entry of the order was

> "that on account of certain waivers of rights and estoppel, of which evidence has been presented to the Referee, Litton's lien can not be successfully challenged in any sort of proceeding."

5. On page of respondent's brief is this assertion:

> "Mr. S. Bruce Jones, counsel for Pepper, appeared for her in the Virginia litigation and actively participated in the trial (R. 319)".

This is a misleading, if not utterly false statement. Mr. Jones, counsel for Pepper, did appear at one day of the hearing and propounded one question to Mr. I. M. Quillen, attorney for Litton, who was at that time testifying. The record shows that counsel for both Pepper and Litton objected to this procedure and that Mr. Jones was not permitted to demand an answer to his question. (R. 320). No counsel for Pepper "actively participated" in the conduct of the suit brought by the trustee.

Respondent's statements on page of his brief with reference to the litigation between Litton and Pepper in the Corporation Court of Bristol, Virginia, during the pendency of the bankruptcy matter of Dixie Splint Coal Company are, to say the least, totally irrevelant to any issue now before this Court. If all the facts concerning

the litigation in the Bristol Court were in the record in this case, they might furnish an interesting sidelight on the present controversy. However, they are not shown in this record, and references (unsupported by the record) to isolated occurrences can be only misleading, or confusing.

It is submitted that respondent's purported restatement of the petitioner's statement of the case is utterly unreliable, and that case, as set forth in her brief, is fully supported by the record and is an accurate and complete statement of the pertinent facts of the case.

THE QUESTION FOR DECISION

In the opening statement of his brief respondent makes the amazing contention that the "question for decision is what is the estate of the bankrupt? and not whether the Litton judgment 'shall be allowed for payment from the estate of Dixie Splint Coal Company, bankrupt', as stated in the brief for appellant."

This is the result of either a total misunderstanding of the case and of bankruptcy law in general, or a belated realization on the part of respondent's counsel that his position with reference to the real question before the Court is unsound and untenable.

That there may be no doubt that the question for decision is the allowability of respondent Litton's claim in bankruptcy, we invite the Court's attention to the record.

Litton filed his formal proof of claim in the bankruptcy matter of Dixie Splint Coal Company on September 26, 1934 (R. 4, 5). The claim is based upon a purported judgment, and the supposed lien of a writ of *fieri facias* issued therefrom on March 19, 1934. Such lien is claimed upon "$961.70 of the proceeds of which said sale is now in the hands of E. F. Hargis, Clerk of the Circuit Court of Russell County, Virginia"; also "upon the sum of $868.37 on deposit in Dominion National Bank in Bristol, Vir-

ginia, to the credit of Dixie Splint Coal Company"; and "upon the sum of $5,718.19, due to the said Dixie Splint Coal Company, Incorporated, by Morris S. Hawkins and L. H. Windholz, Receiver for Norfolk Southern Railway Company." Such lien claim is also made "against any and all other sums due the Dixie Splint Coal Company, Incorporated, to which said Dixie Splint Coal Company, Incorporated, became entitled on or before the 4th day of June, 1934, the return day of said writ."

The proof states Litton's claim to be that "he is entitled to receive payment of said sums mentioned *as a prior or preferred claim against the bankrupt's estate*, and that as to the residue remaining after the application of said sums to his debt he is entitled *to share in the remaining assets of the estate as a common creditor.*"

All of the funds referred to in Litton's claim came into the trustee's hands in due course. There was never any controversy as to the right and duty of the bankruptcy court to administer said funds as assets of the bankrupt's estate. (R. 36; 309, 310, 311; 315). There is now on deposit to the trustee the sum of $6,192.20 which is the total of said sums less labor liens, costs, expenses and fees previously paid (R. 117).

Pepper filed formal exceptions to the allowance of Litton's claim in bankruptcy (R. 6).

By order entered February 22, 1937, the referee allowed Litton's claim (R. 38-42). Pepper petitioned for review (R. 43-45), and the District Court reversed the referee and remanded the proceedings (R. 52, 53). After further hearing, the referee again allowed Litton's claim (R. 107-116). Pepper again petitioned for review (R. 117-120). On June 23, 1938, the District Court entered an order disallowing Litton's claim either as a secured or unsecured claim (R. 120, 121).

Litton appealed to the Circuit Court of Appeals (R. 133), which court reversed the District Court and entered

an order having the effect of allowing Litton's claim (R. 413). On the petition of Pepper this Court granted certiorari (R. 460).

If the judgment of the Circuit Court of Appeals is affirmed, Litton's claim will be allowed and the case terminated. If this court reverses the Circuit Court of Appeals, as petitioner seeks, it will be to affirm the judgment of the District Court disallowing Litton's claim. Any other questions that may be decided will be, of necessity, subsidiary to the main question.

The fact that Litton's proof is upon an alleged lien created more than four months before bankruptcy does not, of course, affect the nature of the question, or the jurisdiction of the bankruptcy court to pass upon the validity of the claim.

LITTON'S FRAUD

The question for decision is whether respondent's claim in bankruptcy shall be allowed or disallowed. Respondent's conduct in connection with the origin of the claim and the bankruptcy of Dixie Splint Coal Company makes the case primarily a fraud case. This view of the case found expression in the second opinion of the District Court, as follows:

> "The evidence taken in this case and the disclosures made thereby since its previous consideration by the Court serve only to give additional weight to the belief previously expressed that the Litton claim and every step taken in connection with it were parts of a planned and fraudulent scheme to prevent the collection of their debts by honest creditors. The claim had a fictitious basis in the first place and was never asserted until there seemed a prospect that Mrs. Pepper would obtain a judgment on a debt justly due her. The confessed judgment was void and the sale under it obviously little more than a gesture whereby Litton was enabled to buy in the entire tangible property of

> the corporation at a nominal sum and transfer it to another of his one man corporations, thereby enabling him to continue in business after having prevented payment of his honest debts. If courts of equity, with full knowledge of such a state of facts as are here disclosed are powerless to interfere, then they are grossly misnamed and the law becomes the shield of fraud rather than a weapon against it." (R. 131).

Respondent seeks now to escape the legal consequences of his proven fraud by the argument that Pepper did not charge him with fraud frequently enough, or that the charges were not properly made, and that, therefore, the charges of fraud should not be argued.

Respondent first contends that no averment or charge of fraud was made before the referee. He then cites cases holding that it is incumbent upon one relying on fraud to assert it, including *Fogg* v. *Blair*, 139 U. S. 118; wherein this court held that it was incumbent upon one charging fraud

> "* * * to state the essential, ultimate facts upon which his cause of action rested; and not content himself with charging, generally, that what was done was 'colorable', a 'fraud', a 'breach of trust', and a 'scheme'," etc.

We accept this principle as a sound and applicable one. On December 18, 1934, Pepper excepted to the allowance of Litton's claim on the stated grounds that the validity of the purported judgment on which it was based was being litigated by the trustee, and that "the same does not constitute a common claim, since the amount claimed under said judgment was never due or owing to the said Scott Litton." (R. 6).

The word "fraud" was not used, but the ultimate, essential fact which made the claim dishonest and fraudulent was alleged in language too plain to be misunderstood.

In every proceeding in the state courts to which she

and Litton have been parties Pepper has charged Litton with fraudulent conduct. This the respondent admits, but contends that the charges were "abandoned" or Litton "vindicated". This contention cannot be supported by the record.

The suit commenced by Pepper against Litton in the Circuit Court of Russell County, Virginia, on June 13, 1934, attacking the validity and bona fides of the confessed judgment in favor of Litton and against Dixie Splint Coal Company, was not dismissed until after the bankruptcy of the judgment-defendant. Litton opposed further prosecution of the suit on this ground (R. 230). The trustee had attacked the judgment by independent suit, and Pepper had filed exceptions in bankruptcy to the allowance of Litton's claim before Pepper's suit against Litton was dismissed. This was hardly an "abandonment" of the charges of fraud.

Respondent next makes the absurd contention that the outcome of the original suit for accounting by Pepper against Litton and others in the Corporation Court of Bristol (R. 103-105) "completely vindicated Litton of all charges of fraud". Litton and his associates had denied any liability.

The Supreme Court of Appeals of Virginia (*Pepper* vs. *Dixie Splint Coal Company*, 165 Va., 179 at 191) held that Litton and his associates *were* liable and that to permit them "to escape liability for the performance of the covenants in the lease would be a fraud."

The case was remanded to the trial court for an accounting and the jury found that Litton was liable to Pepper for the sum of $4,282.94. Respondent's theory seems to be that because Litton was found to be liable for a smaller sum than the one Pepper contended for, that, therefore he was vindicated! The mere assertion of such a contention suggests the answer.

The record in this case reveals a series of planned events and transactions, each dove-tailed into the next,

which constitute a scheme or plan to defraud a bona fide creditor. Respondent seeks to explain away a few suspicious circumstances and fraudulent acts in the series of events. We will refer to a few of these attempts.

An effort is made to disprove Pepper's charge that Litton *falsely* represented to the Corporation Court of Bristol that his corporation (Dixie Splint Coal Company, now the bankrupt) intended to appeal from that court's judgment for $9,000.00 against it. The record shows that such representation was made, execution suspended for ninety days, and amount of suspending bond fixed (R. 215). It is admitted that no such appeal was ever sought. If the representation was not false, then the word "false" has lost its common meaning.

The fact that Pepper later appealed from other phases of the judgment in favor of other parties to the suit can in no way minimize the falsity of the representation made on behalf of Dixie Splint Coal Company. The motion made by Litton to dismiss Pepper's appeal (which respondent undertakes to insert in the record by way of an appendix to his brief) was answered by the Supreme Court of Appeals of Virginia as follows:

> "Motion was made to dismiss the appeal. We have examined the matters set out in the motion and fully considered the contentions of the appellee and the grounds of the motion. There is no merit in this motion and we accordingly overrule the same." *Pepper v. Dixie Splint Coal Co.*, 165 Va. 179, at p. 184.

An attempt is also made to explain the eighty days delay in filing the voluntary petition in bankruptcy for Dixie Splint Coal Company. Respondent now takes the position that there was no connection between the resolution of the board of directors of the corporation passed on June 16, 1934, and the filing of the voluntary petition on September 4, 1934. It is said that the resolution did not "contemplate" bankruptcy. Respondent has overlooked

the fact that the petition for adjudication sworn to by Litton as president recites that it is filed pursuant to the resolution passed on June 16, 1934 (R. 1).

The most transparent excuse offered for any of Litton's maneuvers is the one concerning the release by Dixie Splint Coal Company of its coal lease from Clinchfield Coal Corporation, and the immediate lease of the same coal property to Litton's newest one man corporation, Dixie Beaver Coal Corporation. Respondent's explanation is that the release was necessary

> "* * * because Clinchfield Coal Corporation, by A. K. Morison, et al, had given notice of the cancellation of the lease on June 2, because of default thereunder. A. K. Morison was, and is, general counsel for Clinchfield Coal Corporation, and chief counsel for Pepper in this litigation."

This effort to justify one of the steps in Litton's fraudulent scheme by intimating that opposing counsel knew of the fraudulent aspect of the transaction and acquiesced in it is absurd.

Here is what the record shows about the transaction:

Dixie Splint Coal Company was in arrears with its rents and royalties due to Clinchfield Coal Corporation. Under the terms of the lease agreement notice was given on June 2, 1934, "that at the expiration of thirty days from this date said lessor intends to cancel and annul said lease agreement" (page 125a of transcript of proceedings before referee—part of the record).

The amount of the arrearage was $2,153.00, which was secured by lien upon the property of Dixie Splint Coal Company, which the sheriff sold under the execution from Litton's judgment on June 14. Litton bid more than enough to pay off the Clinchfield lien, and every party in interest admitted the priority of the lien of Clinchfield Coal Corporation.

Litton's corporation did not wait for the notice of cancellation to take effect on July 2. A special meeting of stockholders was called for June 16, and on that date the release was authorized and executed (Tr. pages 125, 125b).

On June 22, 1934, ten days before the notice of cancellation would have taken effect, Litton's newly formed Dixie Beaver Coal Company acquired a lease of the same property. (R. 105, 106).

The assumption that Mr. Morison because he was counsel for the Clinchfield Coal Corporation at this time thus had full knowledge of the fraudulent aspect of Litton's conduct, and that such knowledge was imputed to another client is unwarranted in fact and unjustified in law. Neither the full implication of Litton's acts, nor all the facts composing his scheme were fully known at this time.

The significance and moral aspect of the Litton acquisition of the property of Dixie Splint Coal Company for $3,200.00, and the immediate transfer of the same property to his newest corporation for stock valued at $20,135.36, is not altered in any degree by the fact that the acquisition of the property by the new company "was a matter of public record * * * in the office of the State Corporation Commission". Of course, Mrs. Pepper had no actual knowledge of this transaction.

It is true that counsel for Pepper have not been able to anticipate each step Litton would take and be ready to thwart it with an injunction. Neither have they maintained constant search of the records of all the courts and commissions in Virginia to see what Litton would next do.

RES JUDICATA

We believe that it is perfectly clear that the question before this Court is a "proceeding in bankruptcy." It is also clear that the courts of bankruptcy have exclusive jurisdiction over proceedings in bankruptcy.

Upon principles too well known to require citation of authorities for their support, it follows that the judgment of no other court can be accorded a binding and conclusive effect in this court on the question now before it.

Respondent tacitly admits that this is true and seeks to escape the consequences flowing from the situation by contending that the question before this court was two or three different things.

First the argument is made that the question before this court and the one before the Circuit Court of Russell County, Virginia, were proceedings under Section 67f of the Bankruptcy Act. It is also contended in Respondent's brief that the action in the state court and the proceeding before his court are under Section 70e of the Bankruptcy Act. We submit that both of these contentions are utterly unsound.

The various cases cited by respondent, which deal with situations arising from suits brought under Section 67f and 70e of the Bankruptcy Act, no doubt hold what the respondent contends. Our point is that they can have no possible bearing on the present case.

It is submitted that for the reasons assigned in petitioner's brief the judgment of the Circuit Court of Appeals for the Fourth Circuit is erroneous and should be reversed.

R. Turner Morison,
M. M. Heuser,
Geo. M. Warren,
A. K. Morison,
All of Bristol, Virginia

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 39

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY ROBERTS,
Bristol, Virginia,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 914

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent respectfully submits to this Honorable Court the following brief in opposition to the Petition for a writ of certiorari:

The Question Involved.

The controversy is between Litton and Pepper, judgment creditors of Dixie Splint Coal Company, bankrupt.

Pepper filed her petition in the Bankruptcy Court, questioning the validity of the Litton judgment, and asking that the validity of the Litton judgment and executions thereon be referred to the State courts for adjudication. Litton objected, and insisted that the Bankruptcy Court decide the question, but the objection was disregarded, and

by order of the referee the question was referred to the State courts for decision. The State courts held that Pepper was estopped from questioning the validity of the Litton judgment and executions. *Smith, Trustee,* v. *Litton,* 167 Va. 263, 188 S. E. 214.

Thereupon, Litton pleaded the record and decision in *Smith, Trustee,* v. *Litton* in the Supreme Court of Appeals of Virginia as *res judicata* of the question and as an estoppel against Pepper again questioning the validity of the Litton judgment and executions (R. 6-8).

The referee sustained the plea of *res judicata,* the District Court reversed the referee, and the United States Circuit Court of Appeals reversed the District Court, applied the doctrine of *res judicata,* and remanded the case with instructions to give effect to the decision of the State court (R. 408-412). *Litton* v. *Pepper,* 100 F. (2d) 830.

The petition for a writ of certiorari to this Court raises two of the questions presented in the United States Circuit Court of Appeals, viz.: That the jurisdiction of the Bankruptcy Court was exclusive and non-delegable, and the question of fraud.

Statement of the Case.

This statement will be confined to the matters in the record pertinent to the question of *res judicata* without attempting to correctly restate the whole case.

On June 2, 1934, the sheriff of Russell County, Virginia, advertised for sale on June 14, 1934, the property of Dixie Splint Coal Company under an execution on the Litton judgment against Dixie Splint Coal Company, which had been theretofore delivered to the sheriff and levied upon the property (more than four months before bankruptcy). On June 2, 1934, Pepper delivered an execution on her judgment to the sheriff, which was levied upon the same property. The sheriff made the sale on June 14, 1934, and

on June 15, 1934, filed an interpleader proceeding pursuant to *Section 6152 of the Virginia Code*, exhibiting the two executions, stating that both Litton and Pepper claimed the funds by virtue of their respective executions, and that the Clinchfield Coal Corporation claimed $2,153.00 of the fund under a prior lien, and the sheriff paid the proceeds of the sale, $3,200.00, into court (R. 237-239).

On the same day an order was entered (R. 239) convening said parties and requiring them to appear and "*state and litigate their respective claims as touching the said goods and chattels mentioned and described in the petition, and the proceeds of the sale of same, in order to a decision of their respective rights severally touching the same.*" Pepper (R. 241) and Litton (R. 243) answered admitting the priority of the Clinchfield claim of $2,153.00, and Litton claiming the balance of the fund under his execution, and Pepper referring to and relying upon her bill filed in the same court to have the Litton judgment declared void.

On June 13, 1934, Pepper had filed a bill (R. 210) in the Circuit Court of Russell County against Dixie Splint Coal Company, Litton and the sheriff, exhibiting a copy of her judgment, and of the Litton judgment and executions thereon, praying that the sheriff be enjoined from making the sale under the Litton execution on June 14, 1934, and alleging, among other things:

> "3. Dixie Splint Coal Company, Inc., is a 'dummy' corporation, Scott Litton being the real party in interest, and the same person cannot be both plaintiff and defendant, acting in a dual capacity, adverse to the rights of creditors of the Corporation, of whom Complainant was one.
>
> "4. That said supposed confession of judgment was made with intent to hinder, delay or defraud Complainant from what she is lawfully entitled to.

"5. That Dixie Splint Coal Company, Inc. is not indebted to Scott Litton in said sum of $33,568.89, or in any sum.

"6. That said confession of judgment is void so far as the rights of Complainant are concerned, and in fact is void on its face, and as a matter of law."

Litton and the other defendants promptly filed answers denying the allegations of fraud, and other allegations of the bill (R. 219-225).

No further proceedings were had in the case until it was dismissed on motion of Pepper February 15, 1935 (R. 227), which was before the trial in the independent proceedings, which was had on February 21, 1935 (R. 355).

On July 18, 1934, an order was entered (R. 245) in the interpleader case, stating that it appeared from the answers of Litton and Pepper that the Clinchfield Coal Corporation had a prior lien on the funds paid into court by the sheriff for $2,153.00, and it was ordered that said amount of the funds be paid to Clinchfield Coal Corporation, which was done by the clerk on July 18, 1934 (R. 245-47).

On September 7, 1934, Dixie Splint Coal Company was adjudicated a bankrupt (R. 1). On November 1, 1935, an agreed order was entered, signed by counsel for Pepper, in the interpleader proceedings directing that the $961.50 balance of the proceeds of the sale under the Litton judgment and execution be paid to the trustee in bankruptcy (R. 252-53).

On October 15, 1934 (R. 271-75), Pepper filed a petition in the Bankruptcy Court exhibiting her judgment, attacking the validity of the Litton judgment because not properly confessed, referring to her bill in the Russell Circuit Court seeking to set aside the Litton judgment, also referring to

her notice of October 6, 1934, to quash the executions on the Litton judgment (R. 228-232), and stating (R. 274):

> "Petitioner is advised that it is necessary to determine the validity of the alleged judgment in favor of Scott Litton against the Dixie Splint Coal Company for the orderly administration of the estate of the Dixie Splint Coal Company, in bankruptcy; that the validity of said judgment cannot be collaterally attacked but must be attacked directly in the court in which the said judgment was awarded."

And Pepper asked that the referee enter an order directing the trustee to appear in the Russell Circuit Court, and to submit to the jurisdiction of that court the adjudication of the validity of the Litton judgment. The referee entered the order so requested October 17, 1934, without notice. At the request of Litton the order was reheard on November 8, 1934 (R. 19-25). Litton interposed the interpleader proceedings, and Pepper's actions therein, as an estoppel against her right to contest the validity of the Litton judgment and executions, and asked and urged that the referee decide the question.

At that meeting I. M. Quillen resigned as attorney for the trustee, and M. M. Heuser and C. W. Hamilton were appointed attorneys for the trustee, and directed to give the matters involved their prompt attention, and file such petition on behalf of the Trustee as they deemed advisable. On November 27, 1934 (R. 25), Heuser and Hamilton, attorneys, filed a petition or report stating "that it appears that said (Litton) judgment and executions issued thereon, and a sale made thereunder, involve the title to virtually all of the personal estate of the bankrupt as well as the real estate", and asked for permission to institute a new and independent proceeding in Russell Circuit Court to abate and set aside said judgment and all executions thereon.

On December 8, 1934, Litton filed a written answer (R. 26-28) to said petition, setting out the fact that the Pepper bill in chancery and the Pepper motion were already pending in Circuit Court of Russell County, and that one of those suits should be prosecuted rather than put him to the expense of defending another and third suit, and again relied upon his grounds of estoppel and asked that the referee decide the case.

On December 18, 1934 (R. 188-190), the referee entered an order directing Heuser and Hamilton, attorneys for the trustee, to

> *"proceed to institute such suit in the Circuit Court of Russell County, Virginia, in the name of P. H. Smith, Trustee, in Bankruptcy for Dixie Splint Coal Company, Bankrupt, independent and separate from any suit that may now be pending in said court, as they shall deem necessary or advisable for the purpose of testing the validity of the judgment and any and all executions that have heretofore been issued thereon, and for any other purpose which they may deem necessary and advisable."*

Such independent proceeding was promptly instituted, and the record thereof appears in the Virginia record in this case (R. 178). The Circuit Court of Russell County and the Supreme Court of Appeals of Virginia held that Pepper was the only general creditor of the bankrupt, that the trustee represented Pepper in the proceedings, and that Pepper and the trustee were estopped to contest the validity of the Litton judgment by reason of her actions in the interpleader proceedings in the Russell Circuit Court.

On November 23, 1936, (R. 34-35), Hamilton and Heuser filed their report to the referee, stating, among other things:

> "Therefore, we report unto your Court that the validity of the aforesaid judgment in favor of Scott Litton v. Dixie Splint Coal Company, Inc., in the prin-

cipal sum of $33,468.89 has been established by said Scott Litton to have been regularly confessed in so far as this matter is concerned."

On August 23, 1937 (R. 6-8), Litton filed an answer pleading that the question of validity of the Litton judgment and of the executions issued thereon was *res judicata*, and that Pepper was estopped from further contesting the validity thereof. The referee sustained the plea of *res judicata;* the District Judge reversed the referee and remanded the case for further proceedings, at which further proceedings on August 10, 1938 (R. 66), Pepper made a motion for an appraisal of the property which had been sold under the Litton execution on June 14, 1934. Litton interposed the objections of *res judicata* and estoppel, and other objections to said motion; the referee again decided that the questions raised were *res judicata;* the District Court again reversed the referee, and the United States Circuit Court of Appeals reversed the District Court and applied the doctrine of *res judicata*.

Reasons Why the Petition Should Be Denied.

It is submitted that the petition for a writ of certiorari should be denied for the following, among other, reasons:

1. Neither the petition nor the record reveals that the Circuit Court of Appeals has decided any important question of general law in a way probably untenable or in conflict with the weight of authority, nor has it in any way departed from the usual course of judicial proceedings; nor is it shown that the case involves any question of importance which is of public interest; nor that there is any special or important reason which would call for an exercise of this Honorable Court's supervision.

On the other hand, the petition and the record clearly reveal that the only questions here involved are those which

affect private rights of the particular parties here, and nothing more.

2. The decision of the Circuit Court of Appeals is plainly right.

3. The position taken in the petition that the Bankruptcy Court had exclusive, non-delegable jurisdiction of the question is untenable and not supported by authority. If tenable and supported by authority, the petitioner is estopped from raising the question by her action in requesting the Bankruptcy Court to submit the question to the State court for adjudication. It is well established by the decisions of this Court that a court of bankruptcy may consent to another court, having jurisdiction of the subject matter and the parties, to take jurisdiction and adjudicate the case.

4. The revived charge of fraud will not be heard by a court of equity. This charge was made in the bill in chancery in the Circuit Court of Russell County, in June, 1934, and repeated, by reference, in Pepper's answer in the interpleader proceedings a few days later. Instead of pressing and proving the charge of fraud in either or both of those cases, Pepper abandoned the charge, recognized the validity of the sheriff's sale under the Litton execution, agreed that a part of the funds arising from the sale be paid to the Clinchfield Coal Corporation, and the balance paid to the trustee in bankruptcy, and a little later dismissed her bill. After so waiving and abandoning her charge of fraud, Pepper filed her petition in the Bankruptcy Court asking that the question of the validity of the Litton judgment and executions be submitted to the State court for adjudication. The charge of fraud was not made in the independent proceeding which was ordered to be instituted in the State court pursuant to her petition and the further action thereon.

Argument on Authority.

1. The petition states at the middle of page 11:

> "Said Court held that the judgment of the state court, although rendered in a suit upon a different subject matter and for a different purpose, should be accorded binding effect in the bankruptcy court in a contest over the allowability of the claim."

The question submitted to the State court, and the question submitted to the Bankruptcy Court were upon the same subject matter, viz.: The validity of the Litton judgment and executions thereon.

The point is clearly stated and so well supported by authority in the opinion of the Circuit Court of Appeals that further comment or authority is unnecessary.

However, petitioner seeks to avoid the force of the doctrine of *res judicata* by changing her position, set out in her petition in the Bankruptcy Court, that the Circuit Court of Russell County was the only court having jurisdiction of the question, and claimed in the Circuit Court of Appeals and again avers here that the Bankruptcy Court had exclusive, non-delegable jurisdiction of the question.

In *Jefferson Standard Life Insurance Company* v. *Wilson*, 260 Fed. 593, 596, the court said:

> "A party who, for the purpose of maintaining a suit, has deliberately represented a thing in one aspect, cannot be permitted to contradict his own representations by giving the same another aspect in the same case."

This Court in *Isaacs* v. *Hobbs*, 282 U. S. 734, 739 (relied upon in the petition), held that bankruptcy courts have exclusive jurisdiction in such cases *unless the court consents to another court taking jurisdiction.*

In a brief for Pepper in the District Court, it was stated that:

> "The confession of a judgment against itself by a corporation amounts to a conveyance of its assets."

Section 70 (E) of the Bankruptcy Act expressly gives the State courts concurrent jurisdiction with the Bankruptcy Courts of suits to avoid such transfers. *Rankin* v. *Cox*, 71 F. (2d) 56.

In *Grant* v. *Buckner*, 172 U. S. 232, this Court said:

> "The receiver voluntarily went into the State Court, and having voluntarily gone there, cannot question the right of that Court to determine the controversy between himself and the defendant. *A similar proposition was often affirmed in cases of bankruptcy, although by Section 711, Revised Statutes, the Courts of the United States are given exclusive jurisdiction 'of all matters and proceedings in bankruptcy'*". Citing *Mays* v. *Fritton* and *Winchester* v. *Heiskell*, and continuing, "The same rule applies here. The question presented is not how the estate belonging to the receiver shall be administered, *but what is the estate belonging to him.*"

In *Davis* v. *Wakelee*, 156 U. S. 680, this Court held that a party was estopped by a void judgment.

2. The record shows clearly that Pepper abandoned her charge of fraud as soon as it was made in June, 1934, and litigated along other lines for more than three years, then having lost upon the grounds upon which she had elected to litigate, revived the charge, not at the hearing or in any manner before the referee, but on appeal to the District Judge. It is respectfully submitted that by abandoning the charge then she waived any right to revive it now. *Grimes* v. *Sanders*, 93 U. S. 55; *Robb* v. *Vos*, 155 U. S. 13.

It is not deemed proper in this brief to discuss the numerous misleading statements in the petition about fraud, but the statement at the top of page 2 of the petition will be briefly discussed as typical of all such statements.

The case of *Pepper* v. *Dixie Splint Coal Company*, 165 Va. 179, 181 S. E. 406, was decided about a year before that court decided the estoppel case of *Smith, Trustee*, v. *Litton*. The court did base its opinion in part upon claims of fraud against Litton, but when the case was afterwards tried before a Bristol jury, the jury decided that the charges of fraud against Litton were unfounded, as will be seen by their verdict (R. 103-104). The charge related to the item of $114,375 (R. 375), in the Pepper petition relied upon as the basis of the petition for mandamus, which was denied by the Supreme Court of Appeals of Virginia. Pepper filed a bill of review which was denied, and petitioned the Supreme Court of Appeals of Virginia for an appeal from the decree referred to (R. 103-104) which was denied. It can be demonstrated that all charges of fraud against Litton are unfounded. The fact is, and it can be demonstrated from the record, that Pepper was never entitled to recover a dollar from Litton.

Diminishing the Record.

The petition states on page 12 that Litton refused to agree to the diminution of the "Virginia Record". This is the record of the trial of the independent proceeding instituted at the request of Pepper in the Circuit Court of Russell County to test the validity of the Litton judgment and executions. Pepper, by her counsel, directed the preparation of that record for the purpose of the appeal to the Supreme Court of Appeals of Virginia, and apparently thought at that time that all matters incorporated in the record were pertinent. Litton pleaded that record

and the resulting decision as *res judicata* in this case. That record has been under consideration before the referee, the District Court and the Circuit Court of Appeals, and Litton was advised that it was both improper and unwise to diminish it.

It is, therefore, submitted that the petition should be denied by this Honorable Court.

Respectfully,

HENRY ROBERTS,
Counsel for Respondent.

Bristol, Virginia, May 10, 1939.

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CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 39

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON,

In the Matter of DIXIE SPLINT COAL COMPANY, Bankrupt.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT.

HENRY ROBERTS,
Bristol, Virginia,
Counsel for Respondent.

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BRIEF FOR RESPONDENT.

The Question Involved.

The question for decision is what is the estate of the bankrupt? and not whether the Litton judgment "shall be allowed for payment from the estate of Dixie Splint Coal Company, Bankrupt", as stated in the brief for appellant.

The lien of the execution on the Litton judgment was *created more than four months before bankruptcy*, and the property being admittedly of less value than the amount of the execution debt, if the execution lien is valid, the property is not a part of the estate of the bankrupt.

The writ of *fieri facias* on the Litton judgment was issued by the clerk, delivered to the sheriff, and levied on the physical property of Dixie Splint Coal Company on March 19, 1934, the property was advertised for sale by the sheriff on June 2, 1934 and sold on June 14, 1934. Dixie Splint Coal Company was adjudicated bankrupt on September 7, 1934.

The Bankruptcy Court, upon petition of Pepper, referred the question of the validity of the Litton judgment and execution to the Circuit Court of Russell County, Virginia, for decision. That Court and the Supreme Court of Appeals of Virginia held that Pepper, and Smith, Trustee, were estopped from contesting the validity of the Litton judgment and execution and thereby established the validity of the Litton lien.

Smith, Trustee v. *Litton*, 167 Va. 263; 188 S. E. 214.

The United States Circuit Court of Appeals sustained Litton's pleas of *res judicata* and remanded the case with instructions to give effect to the decision of the State court, and thereby held that the fund and property in controversy were not the estate of the bankrupt—following numerous decisions of this Court.

Litton v. *Pepper*, 100 F. (2d) 830.

Notwithstanding the fact that the Bankruptcy Court referred the question of the validity of the Litton lien to the State court for decision upon the petition of Pepper, he seeks to avoid the application of the doctrine of *res judicata* by taking the position that the Bankruptcy Court had exclusive non-delegable jurisdiction of the question, that the

decision of the State court is of no effect, that Pepper is not estopped, and that Litton is guilty of fraudulent conduct, all of which questions were fully presented to and considered by the Circuit Court of Appeals.

In addition to the plea of *res judicata*, Litton interposed, in the Bankruptcy Court, a plea of estoppel against Pepper (R. 8), upon the ground that on February 11, 1937, she filed a petition in the Bankruptcy Court asking that she be allowed to garnishee the funds in the hands of the Trustee in the Bankruptcy proceeding belonging to Scott Litton, for the purpose of collecting her judgments of $496.97 and $4,282.94, which had been recovered in the Bristol litigation. (For petition see R. 37.)

At the hearing before the Referee on August 23, 1937 (R. 67), Pepper made a motion for an appraisal of the physical property of Dixie Splint Coal Company, Inc., which had been sold on June 14, 1934, and which was involved in the interpleader proceedings in the Circuit Court of Russell County, which motion was opposed by Litton (R. 68), overruled by the Referee, and sustained by the District Judge.

While the brief for appellant states that "a fund of approximately $6,000.00 constitutes the present estate", the brief concludes with the statement that the judgment of the District Court should be affirmed. A part of the $6,000.00 fund is the residue of the proceeds of the sale of the property which the District Court held should be appraised and brought into the bankruptcy case (R. 129-131).

Statement of the Case.

The statement of the case in appellant's brief contains so many incorrect, incomplete and misleading statements, and so much argument based upon such assumed premises, that it is necessary to restate the case, but the statement will be confined to the matters which appear to be pertinent to

the question of *res judicata*, estoppel and jurisdiction, and to the question of argued, and not alleged fraud.

As to Res Judicata, Estoppel and Jurisdiction.

On March 19, 1934, more than four months before bankruptcy, the Litton writ of *fieri facias*, hereinafter referred to as execution, was delivered to the sheriff of Russell County, and on that day levied on the physical personal property of Dixie Splint Coal Company. By virtue of Section 6485 of the Code of Virginia (see Appendix) it thereby created a lien upon such physical personal property, as well as upon the intangible personal property of the execution debtor.

On June 2, 1934, the sheriff advertised such physical property for sale on June 14, 1934. On June 2, 1934, Pepper delivered an execution on her judgment to the sheriff, which was levied upon the same property. The sheriff made the sale on June 14, 1934, and on June 15, 1934, filed an interpleader proceeding pursuant to Section 6152 of the Virginia Code (See Appendix), exhibiting the two executions, stating that both Litton and Pepper claimed the funds by virtue of their respective executions, and that the Clinchfield Coal Corporation claimed $2,153.00 of the fund under a prior lien, and the sheriff paid the proceeds of the sale, $3,200.00, into court (R. 237-239).

On the same day an order was entered (R. 239) convening said parties and requiring them to appear and "state and litigate their respective claims as touching the said goods and chattels mentioned and described in the petition, and the proceeds of the sale of same, in order to a decision of their respective rights severally touching the same."

Pepper (R. 241) and Litton (R. 243) answered admitting the priority of the Clinchfield claim of $2,153.00, and Litton claiming the balance of the fund under his execution, and

Pepper referring to and relying upon her bill filed in the same court to have the Litton judgment declared void.

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The prayer of the bill for an injunction was not presented to any judge, and for that reason was not acted upon, notwithstanding a different conclusion might be drawn from the ambigous statement on page four of appellant's brief.

It also appears from the Pepper petition asking the Bankruptcy Court to direct the Trustee to intervene in the State court for a decision as to the validity of the Litton execution that Pepper knew on May 25 (R. 272), that the Litton execution had been levied upon the property, and that Pepper thus had twenty days within which to prepare the

bill and present the prayer for injunction to any Judge in the State of Virginia, having general jurisdiction of such matters.

Litton and the other defendants promptly filed answers denying the allegations of fraud, and other allegations of the bill (R. 219-225).

No further proceedings were had in the case until it was dismissed on motion of Pepper February 15, 1935 (R. 227), which was before the trial in the independent proceedings, which was had on February 21, 1935 (R. 355).

On July 18, 1934, an order was entered (R. 245) in the interpleader case, stating that it appeared from the answers of Litton and Pepper that the Clinchfield Coal Corporation had a prior lien on the funds paid into court by the sheriff for $2,153.00, and it was ordered that said amount of the funds be paid to Clinchfield Coal Corporation, which was done by the clerk on July 18, 1934 (R. 245-247) to A. K. Morison, General Counsel, who was also chief counsel for Pepper.

On September 7, 1934, Dixie Splint Coal Company was adjudicated a bankrupt (R. 1). On November 1, 1935, an agreed order was entered, signed by counsel for Pepper, in the interpleader proceedings directing that the $961.50 balance of the proceeds of the sale under the Litton judgment and execution be paid to the trustee in bankruptcy (R. 252-53).

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Scott Litton against the Dixie Splint Coal Company for the orderly administration of the estate of the Dixie Splint Coal Company, in bankruptcy; that the validity of said judgment cannot be collaterally attacked but must be attacked directly in the court in which the said judgment was awarded."

And Pepper asked that the referee enter an order directing the trustee to appear in the Russell Circuit Court, and to submit to the jurisdiction of that court the adjudication of the validity of the Litton judgment and execution. The referee entered the order so requested October 17, 1934, without notice. At the request of Litton the order was reheard on November 8, 1934 (R. 19-25). Litton interposed the interpleader proceedings, and Pepper's actions therein, as an estoppel against her right to contest the validity of the Litton judgment and executions, and asked and urged that the referee decide the question.

At that meeting I. M. Quillen resigned as attorney for the trustee, and M. M. Heuser and C. W. Hamilton were appointed attorneys for the trustee, and directed to give the matters involved their prompt attention, and file such petition on behalf of the Trustee as they deemed advisable. On November 27, 1934 (R. 25), Heuser and Hamilton, attorneys, filed a petition or report stating "that it appears that said (Litton) judgment and executions issued thereon, and a sale made thereunder, involve the title to virtually all of the personal estate of the bankrupt as well as the real estate", and asked for permission to institute a new and independent proceeding in Russell Circuit Court to abate and set aside said judgment and all executions thereon.

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pense of defending another and third suit, and again relied upon his grounds of estoppel and asked that the referee decide the case.

On December 18, 1934 (R. 188-190), the referee entered an order directing Heuser and Hamilton, attorneys for the trustee, to

> "proceed to institute such suit in the Circuit Court of Russell County, Virginia, in the name of P. H. Smith, Trustee, in Bankruptcy for Dixie Splint Coal Company, Bankrupt, independent and separate from any suit that may now be pending in said court, as they shall deem necessary or advisable for the purpose of testing the validity of the judgment and any and all executions that have heretofore been issued thereon, and for any other purpose which they may deem necessary and advisable."

Contrary to the statement on page eight of appellant's brief that said order of December 18, 1934, necessarily overruled Litton's plea of estoppel against Pepper, the order neither mentioned nor overruled the plea, but on the contrary, referred the question to the Circuit Court of Russell County for decision.

Such independent proceeding was promptly instituted, and the record thereof appears in the Virginia record in this case (R. 178). The Circuit Court of Russell County and the Supreme Court of Appeals of Virginia held that Pepper was the only general creditor of the bankrupt, that the trustee represented Pepper in the proceedings, and that Pepper and the trustee were estopped to contest the validity of the Litton judgment by reason of her actions in the interpleader proceedings in the Russell Circuit Court.

While the said order of December 18, 1934 does not state that it was entered at the request of Pepper, the minutes of the meeting of November 8, 1934 (R. 19 at bottom 23) show that Pepper had asked that the independent proceed-

ing be instituted, and the controversy at that time between Pepper and Litton was that Litton desired the Bankruptcy Court to decide the question of estoppel, and, in any event that it be decided in one of the cases already instituted by Pepper in the Circuit Court of Russell County, and that Pepper had changed the request in her petition to intervene by asking (R. 23) "we desire to broaden the motion of Jean McNeil Pepper in the Bankruptcy proceeding by having it include a direction by the referee to the trustee to move the Circuit Court of Russell County, Virginia, to quash any and all executions issued by said Court on a judgment confessed by Dixie Splint Coal Company, Inc., in favor of Scott Litton, on the ground that said confession of judgment is void."

Mr. S. Bruce Jones, Counsel for Pepper, appeared for her in the Virginia litigation and actively participated in the trial (R. 319).

On November 23, 1936 (R. 34-35), Hamilton and Heuser filed their report to the referee, stating among other things:

> "Therefore, we report unto your Court that validity of the aforesaid judgment in favor of Scott Litton *v.* Dixie Splint Coal Company, Inc., in the principal sum of $33,468.89 has been established by said Scott Litton to have been regularly confessed insofar as this matter is concerned."

On August 23, 1937 (R. 6-8), Litton filed an answer pleading that the question of validity of the Litton judgment and of the executions issued thereon was *res judicata*, and that Pepper was estopped from further contesting the validity thereof. The referee sustained the plea of *res judicata;* the District Judge reversed the referee and remanded the case for further proceedings, at which further proceedings on August 10, 1938 (R. 66), Pepper made a motion for an appraisal of the property which had been

sold under the Litton execution on June 14, 1934. Litton interposed the objections of *res judicata* and estoppel, and other objections to said motion; the referee again decided that the questions raised were *res judicata;* the District Court again reversed the referee, and the United States Circuit Court of Appeals reversed the District Court and applied the doctrine of *res judicata.*

During the pendency of the bankruptcy case Pepper continued the litigation against Litton at Bristol, which had been instituted in 1931, and had recovered a judgment for costs in the Supreme Court in 1935 for $496.97 against Litton and recovered a judgment on August 8, 1936 in the Bristol Court for $4,282.94 (R. 103-105).

Pepper filed a bill of review of the decree of August 8, 1936, which was denied, and later applied to the Supreme Court of Appeals of Virginia for an appeal from the decree denying the bill of review. Before the conclusion of her efforts to get a review of the decree for judgment of August 8, 1936, Pepper on February 11, 1937 (R. 37) filed a petition in the Bankruptcy Court setting up said judgments against Litton for $496.97 and $4,282.94, and asking she be allowed to garnishee the dividends coming to Litton in the bankruptcy case. On August 23, 1937 (R. 6 at 8) Litton pleaded the filing of said petition as an admission of the validity of the Litton execution lien against Dixie Splint Coal Company as an estoppel against Pepper.

As soon as Pepper's petition for an appeal from the Bristol decree of August 8, 1936 was denied, Litton paid to Pepper the judgments of $496.97 and $4,282.94, within the fifteen days stay period provided in the said decree.

As to the Argued Fraud.

No written or oral averment or charge of fraud was made in any paper filed or statement made before the referee.

Fraud was first argued on the appeal to the District Judge in 1937, and has been argued in the successive appeals since then. New arguments of fraud have been made in desperation in the successive appeals.

It is believed that a sufficient answer to these arguments of fraud is that this Court and every Court in the land has held that one who relies upon charges of fraud must first specify the allegations of fraud in a proper pleading, and then prove the charges clearly, and since no such charges have been pleaded or proven, they should not be argued.

Pepper did allege that the Litton debt was not due, and that the Litton judgment was confessed to hinder, delay and defraud his creditors, including Pepper, in the bill filed in the Circuit Court of Russell County, Virginia, on June 13, 1934, which bill prayed that the sheriff's sale of the physical property of Dixie Splint Coal Company on June 14, 1934, be enjoined. The injunction was not applied for. The bill was made a part of the answer filed by Pepper in the interpleader proceeding instituted by the sheriff for the purpose of convening Litton and Pepper before the Court to test the validity of their respective executions. These charges and allegations of fraud were promptly abandoned, and the bill soon afterward dismissed, and no suggestion or argument of fraud was made in the bankruptcy proceeding for three years or more, and then only in argument on appeal.

However, since half of Appellant's brief is devoted to an argument of fraud on the part of Litton, it is deemed proper to reply to such argument *seriatum*.

After the decision in *Pepper* v. *Dixie Splint Coal Company et al.*, 165 Va. 179, 181 S. E. 406, the case was tried before a Bristol jury, where Pepper resided. The verdict (R. 103-105) of the jury completely vindicated Litton of all charges of fraud.

The Litton judgment was confessed June 2, 1933, which was more than eight months before the Pepper judgment for $9,000 was rendered on February 19, 1934 (R. 214). Litton had ample time to have proceeded to judgment by motion or action, and the judgment was confessed, upon advice of counsel, to save expense. The statement that "Litton falsely represented that his corporation intended to appeal from its judgment" is typical of these unfounded charges. The decree (R. 214) shows that both parties expressed a desire to appeal from the decree. Dixie Splint Coal Company was required to give a suspending bond to suspend execution on the judgment against it. No bond was required of Pepper, of course. From the motion to dismiss the appeal later taken by Pepper (see Appendix) it appears that Pepper ordered the record prepared for the purpose of applying for the appeal, and wrote counsel for the defendants on April 16, 1934, that Pepper "will not prosecute an appeal because the cost of printing the record was beyond her ability to pay", that the record had been made up, and that defendants could have the record for the amount paid therefor, $153.00; also that Pepper was having the $9,000 judgment docketed and would proceed for the collection thereof. Thereupon, relying upon said letter, the defendants decided not to proceed with the preparation of the petition for appeal from the judgment against the "Third" Dixie Splint Coal Company (*i. e.*, the $9,000 judgment). Then on August 16, 1934, three days before the expiration of the period within which the "Third" Dixie Splint Coal Company could apply for an appeal, Pepper, without notice of the change in her intention, applied for the appeal against the "First" and "Second" Dixie Splint Coal Company, but not against the "Third" Dixie Splint Coal Company, the judgment against which Pepper accepted. Thus the Dixie Splint Coal Company did not have time within which to perfect an appeal.

The Deputy Sheriff was not only not cooperating with Litton, but advertised and sold the property on June 14, 1934, and promptly interpleaded the parties as provided by statute, and caused an order to be entered by the Court convening them for the purpose of litigating their respective claims under their executions.

Another typical statement is made as an excuse for not presenting the bill for injunction, viz: "But on account of the absence of the Judge, the prayer for injunction was not acted upon." Pepper admits (R. 272) that she knew on May 25th the Litton execution had been levied on the property. She had twenty days within which to prepare and present the injunction bill to stop the sale. It was not necessary to wait until the judge of the Russell County Circuit Court was absent, because under Section 6319 of the Code (See Appendix) the bill could have been presented to Judge Roberts at Bristol, where Pepper and her counsel reside, or to Judge Robertson, at Abingdon, fifteen miles from Bristol, or to Judge Carter, at Gate City, thirty miles from Bristol, or by driving some seventy-five miles from Bristol to see the absent Judge.

The property was not purchased by Litton individually, but as agent for Dixie Splint Coal Company, afterward incorporated as Dixie-Beaver Coal Company.

The resolution pursuant to which the petition in bankruptcy was filed did not indicate that bankruptcy was then contemplated. It is found in the narrative of proceedings before the Referee, sent up as an original exhibit, page 125-C, viz:

> "A further full and complete discussion of the conditions of the corporation was gone into, and by unanimous consent the stockholders present, do hereby ratify and approve all acts of the officers in connection with the handling of the affairs of the company, and instructs them to settle up and liquidate the affairs of the corpo-

ration in as economical and thorough manner as they are able to do, and to preserve the remaining assets of the corporation for its creditors as their respective interests may appear, and to do any such other things in connection therewith as they deem prudent and wise."

Litton acquired no rights, and Pepper lost none, by reason of bankruptcy The Litton execution had been levied on the physical property, and the money in bank and main debt due the Company, had been garnished under the execution, which execution the Supreme Court of Appeals later held valid because Pepper was estopped to contest it. The apparent reason for bankruptcy was to concentrate the litigation then pending in Russell County, Bristol and Norfolk.

Said narrative of proceedings, at pages 125-A and 125-B, shows that the Clinchfield lease was released because Clinchfield Coal Corporation, by A. K. Morison, *et al.*, had given notice of the cancellation of the lease on June 2, because of default thereunder. A. K. Morison was, and is, general counsel for Clinchfield Coal Corporation, and chief counsel for Pepper in this litigation. The transfer of the tangible property to Dixie-Beaver Coal Corporation for $20,135.36 of its capital stock was made a matter of public record at the time in the office of the State Corporation Commission, as required by law.

The new lease form Clinchfield Coal Corporation to Dixie-Beaver Coal Corporation was either prepared or approved by A. K. Morison, its general counsel, and he knew what was being done at the time the charges of fraud against Pepper were made and abandoned in the chancery suit and interpleader proceedings. The suspension of the Pepper judgment for $9,000 under the suspension bond executed by Dixie Splint Coal Company expired about May 19. Pepper, by A. K. Morison, had written Litton's attorneys (See Appendix) April 16, 1934, that the judgment was being docketed and proceedings would be taken to collect it. Of the with-

drawals by Litton and Smith now complained of Litton withdrew $3,936.69 on May 31, 1934 (R. 79), and Smith withdrew $3,333.32 on or after May 31, 1934 (R. 83). So that Pepper could easily have prevented such withdrawals by garnishment proceedings, if it had been desired to do so.

The personal ledger accounts of Litton and Smith showed that each of them had been credited with salaries of $500.00 per month, and that a large part of such salaries had been paid for seven years before the Pepper claim was ever heard of.

The addresses of both Litton and Pepper were inadvertently omitted from the bankruptcy schedules. The first meeting was continued for that reason. At the creditors' meeting of November 8, 1934, at which Pepper was represented by Mr. Morison and Mr. Cantwell, the statement was made by counsel for Litton that "Pepper has never filed any proof of claim in bankruptcy till this date, *although she has had full notice and knowledge of the bankruptcy proceedings since their inception.*" (R. 21, near bottom.)

The record shows (R. 24) "the referee was informed by someone that Messrs. Warren and Cantwell represented Mrs. Pepper and the referee's recollection is that the copy of the notice adjourning the first meeting was mailed to Messrs. Warren and Cantwell, but the referee does not make this as a positive statement." Mr. Cantwell was at the meeting at which the referee made that statement.

The record shows (R. 231) that Pepper had notice on October 6, 1934 of the bankruptcy, and also on October 15 when she filed her petition asking that the trustee be directed to intervene in the litigation in the State Court (R. 271-275). She did not file her claim until November 8, when she was forced to file it to be heard upon her petition to intervene (R. 19).

Smith and Quillen were selected as trustee and attorney by creditors other than Litton, because of their familiarity

with the business. Quillen resigned as soon as the controversy developed and Smith resigned later, when requested to do so.

At this point it is proper to refer to the statement in the opinion of the Circuit Court of Appeals (R. 410, middle): "No charge was made as to the validity of Litton's claim against the corporation perhaps for the reason that P. H. Smith, who was the Secretary-Treasurer of the Corporation, and confessed the judgment on its behalf, was also the trustee in bankruptcy."

The independent proceeding was instituted by Heuser and Hamilton, without consulting Smith, who had nothing whatever to do with the preparation of the papers, and did not see them until after they were filed.

Litton did not oppose and attack on the confessed judgment. He asserted that Pepper was estopped from attacking the judgment, insisted that the referee should pass upon the question of estoppel, and that in any event if the referee did not decide the question, that the trustee should go into one of the cases already pending in the Circuit Court of Russell County, and not institute the independent proceeding.

The referee did not pass upon or overrule Litton's plea of estoppel against Pepper by the order of December 18, 1934.

Litton had a right to pay, and did personally pay, the unsecured claims against the bankrupt.

The Trustee did file a motion or independent proceeding in the Russell Circuit Court to set aside the Litton judgment upon the ground that it was void upon its face. The motion was prepared by Hamilton and Heuser without consulting the Trustee, and did not aver that the debt was not due, or that the judgment was fraudulent.

Counsel for the Trustee reported (R. 34-35) that the validity of the Litton judgment and execution had been established by the decision of the Supreme Court of Appeals

of Virginia. If Pepper thought otherwise at that time the case should have been appealed to this Court.

Authorities and Argument.

The application of the doctrine of *res judicata* appears to be decisive of the case. This point will be considered first. The discussion of this point will also be a reply to the second and third points in appellant's brief, relating to estoppel. The question of the exclusive non-delegable jurisdiction of the bankruptcy court will then be discussed, followed by a brief discussion of the question of fraud.

I.

The Doctrine of Res Judicata.

This Court in the leading American case of *Cromwell* v. *County of Sac*, 94 U. S. 351, 24 L. Ed. 195, stated the law on this subject as follows:

> "A judgment is a finality as to the claim or demand in controversy * * * not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

In addition to the cases cited in the opinion of the United States Circuit Court of Appeals, a few cases illustrating the application of the above-stated doctrine, some of them bankruptcy cases, and most of them cases in which Federal Courts have applied the doctrine to decisions of State Courts, are cited:

City of Wheeling v. *John F. Casey* Co., 89 F. (2d) 308 310;

Guettel v. *U. S.* (C.C.A.8) 95 F. (2d) 229;

American Surety Co. v. *Baldwin*, 287 U.S. 156;

In re: Cherokee Public Service Co. (C. C. A. 8), 94 F. (2d) 536;

Bereth v. *Sparks* (C. C. A. 7), 51 F. (2d) 441, 80 A. L. R. 909;

Johnson v. *Burke Manor Building Corporation*, (C.C. A.7) 48 F. (2d) 1031.

The case of *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, 234, 77 L. Ed. 1140, 1145, is authority that Pepper is estopped.

The argument is made that because the question that the account was not justly due and that the judgment was fraudulent were not made in the independent proceeding that Pepper is not estopped from raising these points at this time. However, it is elementary that a litigant must present his whole case at one time, and if he does not do so, he will not thereafter be heard on the points not presented.

It is the duty and right of litigants, whether plaintiff or defendant, to allege and prove every point pertinent to their case. They decide what to allege and prove. If a plaintiff has three points, but elects to stand or fall on one of them, he may do so, but cannot afterwards assert the the other two points. Pepper, in June, 1934, alleged three points, viz: the debt not due Litton, fraud, and that the judgment was not confessed as provided by statute. She alleged these three points in the Chancery suit, and by reference in the Interpleader suit. She then promptly abandoned two of them, and by her acts waived the third one, and agreed that the Litton judgment and execution were valid. She thereby estopped herself from afterwards asserting any of the three points thus abandoned and waived. In her petition to the Referee she again recognized of record the fact that she had abandoned and waived the first two points, which she now attempts to reassert. She then proceeded to assist the Trustee in the independent proceeding to test the validity of the Litton judgment and execution on the only ground

she had elected to test it. If the question is not *res judicata*, and if she is not estopped, we do not see how a litigant can be estopped in any case.

The point is made in the brief for Appellant, that the judgment is void because not confessed in accordance with the Virginia statute. This Court held in *Davis* v. *Wakelee*, 156 U. S. 680, 39 L. Ed. 578, 583-585, that a party was estopped by a void judgment.

It is also claimed in Appellant's brief that the judgment of the Supreme Court of Appeals of Virginia is erroneous and of no effect. This Court held in *North Carolina R. Co.* v. Story, 268 U. S. 288, 69 L. Ed. 959, that "a judgment not appealed from, however, erroneous, is *res judicata*," hence the only way for Pepper to raise the question as to the decision of the Supreme Court of Appeals of Virginia was to have appealed the case directly to this Court.

It was decided in *Swift & Co.* v. *United States*, 276 U. S. 311, 72 L. Ed. 587, that a party cannot afterwards complain of a consent decree, although grossly erroneous.

The Circuit Court of Russell County, Virginia, had jurisdiction of the parties and of the subject matter, and the decision of that Court and of the Supreme Court of Appeals of Virginia is not only clearly correct, as will appear from a reading of the opinion of the Supreme Court of Appeals, but under the rules of comity it is binding upon this Court and all other courts.

The case of *Tucker* v. *Foster*, 153 Va. 182, is an instructive case on the application of Section 5186 of the Code of Virginia, and shows that by filing her bill alleging fraud and recording her *lis pendens*, she created a lien on the property in controversy, if she succeeded in the suit, and that she was afforded an ample and adequate remedy under the laws of Virginia to asert and enforce her rights. However, she elected to abandon her charges and is now without remedy.

II.

Exclusive Jurisdiction of Bankruptcy Courts.

It has been decided by this Court in several cases that the so-called "exclusive jurisdiction" of bankruptcy courts under Section 67-f of the Bankruptcy Act refers only to cases falling within the four months provision of that section and excludes cases wherein the lien was created more than four months before bankruptcy.

Straton v. *New*, 283 U. S. 318, 75 L. Ed. 1060.
Metcalf v. *Barker*, 187 U. S. 165, 47 L. Ed. 122.
Connell v. *Walker*, 291 U. S. 1-6, 78 L. Ed. 613.

All of these were cases of fraud, instituted under statutes similar to the Virginia statute, under which Pepper filed her bill in the Russell Circuit Court.

In a note to *Straton* v. *New*, in 75 L. Ed. 1060, reviewing the cases on this subject, it is stated (page 1072):

> "The implication from the language of the holdings of the cases warrants the conclusions that the so-called "exclusive jurisdiction" of the bankruptcy court in proper cases (*i. e.* cases falling within the four months provision) does not ipso facto oust the jurisdiction of the state court, or invalidate proceedings had thereunder; and that in the absence of interference by the bankruptcy court, or of its restraining order or other act in derogation of the exercise of jurisdiction by the state court, or where the bankruptcy court grants permission for the institution of the proceedings in the state court, the latter court has jurisdiction and right to entertain a suit to foreclose the lien and proceed to sale thereunder."

Later, this Court so decided in the above case of *Connell* v. *Walker, supra.*

In a brief for Pepper in the District Court it was stated that:

> "The confession of a judgment against itself by a corporation, amounts to a conveyance of its assets."

Section 70 (E) of the Bankruptcy Act expressly gives the State courts concurrent jurisdiction with the bankruptcy courts of suits to avoid such transfers. *Rankin* v. *Cox*, 71 F. (2d) 56.

In *Winchester* v. *Heiskell*, 119 U. S. 450, 30 L. Ed. 462, 464, this Court said:

> "The assignee in bankruptcy appeared in the State Court and litigated his rights there. This he had authority to do, and the judgment in such an action is binding on him. This we have many times decided." *Mays* v. *Fritton*, 20 Wall. 414 and citing other cases.

In *Grant* v. *Buckner*, 172 U. S. 232, 43 L. Ed. 430, this Court said:

> "The receiver voluntarily went into the State Court, and having voluntarily gone there, cannot question the right of that Court to determine the controversy between himself and the defendant. *A similar proposition was often affirmed in cases of bankruptcy, although by Section 711, Revised Statutes, the Courts of the United States are given exclusive jurisdiction 'of all matters and proceedings in bankruptcy.'*" Citing *Mays* v. *Fritton* and *Winchester* v. *Heiskell*, and continuing, "The same rule applies here. The question presented is not how the estate belonging to the receiver shall be administered, *but what is the estate belonging to him.*"

The Bankruptcy Court having submitted the question of the validity of the Litton judgment to the State court at the request of Pepper, and over the objection of Litton, the State court having decided that Pepper and the trustee have

no right to question the validity of the Litton judgment, its validity is established for all purposes.

Moore v. *Greene*, 145 Fed. 472, 477-478.

Comer v. *John Hancock Mut. Ins. Co.*, 80 F. (2d) 413, at 417.

In re: Barrett & Co., 27 F. (2d) 159.

U. S. Fidelity & Guaranty Company v. *Bray*, 225 U. S. 205, 56 L. Ed. 1055, is relied upon by appellant. In this case the Bankruptcy Court had taken jurisdiction and control of the estate of the bankrupt. Afterwards the Bankruptcy Court directed the Trustee to institute a suit in the State court, over the objection of some of the creditors. The creditors insisted upon their objection and were sustained. But, in this case Pepper petitioned the Bankruptcy Court to direct the Trustee to sue in the State court. Litton objected but did not insist upon his objection, and Pepper cannot now complain of the result.

In the case of *Isaacs* v. *Hobbs Tie and Timber Company*, 282 U. S. 739, 75 L. Ed. 645, this Court stated that in the cases in which the Bankruptcy Court had exclusive jurisdiction, the State court could not interfere *without the consent of the Bankruptcy Court.*

The law arises out of the facts. The decisions relied upon in the brief for Pepper are applicable to the facts in the cases so cited, but do not apply to the facts in this case. Here, the things now complained of were done at the request of Pepper. In the cases cited, the parties prevailing in this Court did not ask or agree that the things be done that were done, but objected, and appealed.

III.

The Argued Fraud.

Common-sense justice, as well as the due process clause of the constitution, require a litigant who intends to rely upon

fraud of which he claims his opponent is guilty, to (1) be diligent in discovering the fraud and prompt in asserting it, and (2) state specifically and clearly the fraudulent acts and prove them by clear and convincing evidence.

In this case, Pepper has made no averments of fraud, either written or oral, before the Referee, which is the Trial Court in Bankruptcy, but first made the charge by argument in the appeal to the District Judge in 1937, and almost three years after the charge, if intended to be relied upon, should have been made before the Referee.

Pepper had charged Litton with fraud in the Chancery case and in the Interpleader proceeding in the Circuit Court of Russell County in June, 1934, but promptly abandoned the charges, and agreed to the validity of the Litton judgment, in the Interpleader proceeding and dismissed the Chancery suit. She thereafter remained silent about the fraud until the brief for her was filed before the District Judge in 1937.

This Court held in *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, 43 L. Ed. 1103, 1106:

> "It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief."

In *Societe Fonciere et Agricole des Etats Unis* v. *Milliken*, 135 U. S. 304, 34 L. Ed. 208, 210, this Court held that an unexcused delay of nearly two years in a case like this was fatal.

In *Moss* v. *Riddle*, 5 Cranch 351, 3 L. Ed. 123, it was held:

> "Fraud consists in intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea and would have been traversable."

In *Fogg* v. *Blair*, 139 U. S. 118, 35 L. Ed. 104, 107, the Court said:

> "As he impugned the good faith of the transaction between the company and the contractors, it was incumbent upon him to state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was 'colorable', a 'fraud', a 'breach of trust', and a 'scheme' by which Blair and Taylor were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer will not admit."
> *Willis* v. *Blue Ridge Bank*, 153 Va. 392, 403.

If Pepper had made timely and specific charges of fraud against Litton, and if Litton had had an opportunity to controvert such charges in the trial court, they could not, and would not, have supported the unfair and unwarranted argument made in the brief for appellant.

When the charges of fraud which were made by Pepper against Litton in the Chancery suit and Interpleader proceedings in the State court in June, 1934, were abandoned soon after they were made, and not thereafter repeated in the proceedings before the Referee in Bankruptcy at any time; Litton and his counsel naturally did not undertake to answer or explain the arguments of fraud which were made for the first time on appeal, and have been repeated with more desperation on each successive appeal. The case has been hard fought, in at least ten suits or court proceedings, for more than eight years. The record shows that there has been no preconceived "scheme" or plan by anyone regarding the litigation at any time or stage thereof. The record reflects the opposite. The explanation of Pepper's action in charging Litton with fraud in June, 1934, when Pepper knew, or could have learned, by due diligence, in the prosecution of the Chancery suit or the Interpleader proceeding, of practically every fraudu-

lent act of which she now complains, and then promptly abandoned her charges of fraud in that litigation, and then not only remained silent about it for about three years in the proceedings before the Referee in Bankruptcy, but apparently studiously avoided raising the question in the independent proceeding in the State court, is a mystery to Litton and his counsel, unless it be explained by two things:

(1) Pepper may have been advised that she had estopped herself by her actions in the Interpleader proceeding, and hence insisted upon the Trustee instituting the independent proceeding, rather than have the question of estoppel decided by the Bankruptcy Court, or in one of the two cases she had already instituted in the State court, as Litton urged. The thought possibly being that the estoppel against her would not apply against the Trustee.

(2) Another explanation may be that in the Bristol litigation Pepper was vigorously prosecuting her suit against Litton, and apparently confidently expecting to recover a judgment against him for about $125,000. It was well known that Dixie Splint Coal Company was a small corporation, and that the coal business had been unprofitable for years, but it was apparently (erroneously) thought that Litton had accumulated considerable wealth. Let us look at the record. After the Supreme Court of Appeals of Virginia had decided the case of *Pepper* v. *Dixie Splint Coal Company et al.* in the fall of 1935, and had held Litton individually liable under the lease from the Peppers, Pepper filed a petition in the Bristol court and later a mandamus proceeding in the Supreme Court seeking to recover a judgment against Litton for $125,151.89 (R. 376). This total was made up of an item of $75,000 royalty on five hundred thousand tons of unmined coal *at the date of the complete breach of the lease contract on February 1,*

1928; interest on the $75,000 of $39,375.00, and unpaid minimum royalties and interest thereon from 1920 to 1927, inclusive, of $10,401.89 (R. 374-376). The Corporation court and the Supreme Court denied the petition. The case was tried before a Bristol jury in August, 1936, and a verdict and judgment were rendered for $4,282.94. The jury had decided that Litton was not guilty of any fraud, that the merchantable marketable coal on the Pepper property was exhausted February 1, 1928, and rendered a verdict for the balance of the minimum royalties up to the end of 1927, with interest on the minimum royalties, the total verdict being $4,282.94. Pepper delayed almost six months before filing a bill of review, which was denied, and then within the six months period allowed by law, applied to the Supreme Court of Appeals for an appeal, which was denied, during the summer of 1937.

During the period of the prosecution of this claim for around $125,000 against Litton, it was in the interest of Pepper for Litton to accumulate all the property he could, as that would make it easier for Pepper to collect her expected judgment of $125,000 against him. But when Pepper failed to recover the $125,000 judgment against Litton, she then decided to claim that Litton had been guilty of fraud *ab initio* and raised the smoke screen in the brief before the District Judge in 1937.

In this connection the Pepper petition in the mandamus case (R. 374-376) above referred to, shows that the $9,000.00 Pepper judgment against Dixie Splint Coal Company (R. 214-215) was and is an error apparent on the face of the record, because the $9,000 judgment was for minimum royalties accruing from July 1, 1928 to July 1, 1931, whereas Pepper had alleged in her cross-bill against Litton, and more clearly in the petition referred to in the mandamus case, that the entire and complete breach of the lease contract, under which Litton was held liable, occurred Febru-

ary 1, 1928. Manifestly no minimum royalty could accrue after the final and complete breach of the contract was fixed and alleged by Pepper to have occurred on February 1, 1928, so that as a matter of equity the $9,000 judgment is not due Pepper.

If a proper element of damages, the $9,000.00 item would have been included in the verdict, which was only $4,282.94, under the decision of the Supreme Court of Appeals holding Litton liable for all breaches of the lease contract. Pepper raised this point in a motion to set aside the verdict of the jury. It was denied by the trial Court and an appeal denied by the Supreme Court of Appeals.

Conclusion.

It is believed that elementary rules apply to this case. Some of these are:

(1) A litigant who feels himself aggrieved by the action or ruling of a court must object at the time, and is usually required to state the grounds of his objection, and then appeal from the ruling. Otherwise, he cannot thereafter raise the question.

(2) *A fortiori*, if and when a litigant asks or agrees that a thing be done, or acquiesces in its being done, and it is done, and he is not satisfied with the result, he cannot thereafter complain about the result, or ask that the same question be decided again.

(3) When a court refers a question to another court, having jurisdiction of the parties and subject matter, for decision, at the request of a litigant, both the rule of comity and common sense require that the court, and requesting litigant, accept the decision of the court requested to make it.

(4) A party presenting a cause of action to a court for decision cannot split the cause of action into several actions,

but must present its whole case in one action. If he elects to stand or fall on one of several grounds of his cause of action, he cannot thereafter be heard on the other grounds.

(5) A litigant will not be permitted to take inconsistent positions in the same litigation or series of litigation.

(6) A litigant who is silent when he ought to speak, will not be heard to speak when he ought to be silent.

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit is right, and should be affirmed.

HENRY ROBERTS,
Counsel for Respondent.

October 7, 1939.

(See Appendix for relevant statutes, and copy of motion to dismiss in *Pepper* v. *Dixie Splint Coal Company et al.*)

APPENDIX.

The following sections are copied from the Virginia Code:

5184. Fraudulent Acts That Are Void; Bona Fide Purchasers Not Affected.—Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder, or defraud creditors, purchasers, or other persons, their representatives, or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.

5186. Judgment or Decree Not Necessary Before Suit by Creditor to Avoid Gift, Transfer, et cetera, of Debtor's Estate; Measure of Relief; Extent of Lien Given Creditors; How Perfected Against Creditors and Purchasers.—A creditor before obtaining a judgment or decree for his claim may, whether such claim be due and payable or not, institute any suit which he might institute after obtaining such judgment or decree to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor declared void by either of the two preceding sections; and he may in such suit have all the relief in respects to said estate to which he would be entitled after obtaining a judgment or decree for the claim which he may be entitled to recover. A creditor availing himself of this section shall have a lien from the time of bringing his suit on all the estate, real and personal, hereinbefore mentioned, and a petitioning creditor shall be entitled to a like lien from the time of filing his petition in the court or in the clerk's office of the court in which the suit is brought. If the proceeds of sale be insufficient to satisfy the claim of all the creditors whose liens were acquired at the same time they shall be applied ratably to such claims, and the court may make a personal decree against the debtor for any deficiency remaining on the claim of any creditor after applying thereto his share of the proceeds of sale, or if he be not entitled

to share in the such proceeds, may render a personal decree against the debtor for the full amount of the creditor's claim. And in any such case if the gift, deed, assignment, transfer, or charge be declared void, the court shall allow counsel for the creditors a reasonable attorney's fee to be paid out of the proceeds of sale as other costs are paid provided the attorney's fee allowed does not affect a prior lien creditor not represented by said attorney. This section is subject to the provisions of section sixty-four hundred and sixty-nine.

6485. What a Writ of Fieri Facias May Be Levied On; From What Time It Binds; When Lien Thereof Ceases.—By a writ of fieri facias, the officer shall be commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is. The writ may be levied as well on the current money and bank notes, as on the goods and chattels of such person, except such as are exempt from levy under chapter two hundred and seventy-four, and shall bind what is capable of being levied on only from the time it is delivered to the officer to be executed. The lien of a writ of fieri facias under this section, on what is capable of being levied on but is not levied on under the writ on or before the return day thereof, shall cease on that day; provided, however, that property levied on, on or before the return day may be advertised and sold within a reasonable time thereafter, and the lien given by this section may also be enforced after the return day of the writ by proceedings under section sixty-five hundred and three and following of this chapter, if such proceedings be commenced before that day.

Section 6503 provides for garnishment proceedings to ascertain on what intangible personal property, etc., the lien of the execution under Section 6485 rests.

6151. The Proceedings, When Defendant Disclaims Interest in the Subject; How Right of Third Party Tried.—Upon affidavit of a defendant in any action that he claims no interest in the subject matter of the action, but that some third party has a claim thereto, and that he does not collude with such third party, but is ready to pay or dispose of the subject matter of the action as the court may direct, the

court may make an order requiring such third party to appear and state the nature of his claim, and maintain or relinquish it, and in the meantime stay the proceedings in such action. If such third party, on being served with such order, shall not appear, the court may, on proof of the plaintiff's right, render judgment for him, and declare such third party to be forever barred of any claim in respect of the subject matter, either against the plaintiff or the original defendant, or his personal representative. If such third party, on being so served, shall appear, the court shall allow him to make himself defendant in the action, and, either in said action or otherwise, cause such issue or issues to be tried as it may prescribe, and may direct which party shall be considered the plaintiff in the issues, and shall give judgment upon the verdict rendered on such trial, or if a jury be waived by the parties interested, shall determine their claims in a summary way.

6152. How Claim of Third Party Tried to Property Distrained or Levied on.—When property, of the value of more than twenty dollars, is taken under a warrant of distress, or under a writ of fieri facias issued by a justice, or when property of any value is taken under a writ of fieri facias issued by the clerk of a court, and any person, other than the party against whom the process issued, claims such property, or the proceeds or value thereof, the circuit court of the county, or the circuit or corporation court of the corporation, in which the property is taken, or the judge of such court in vacation, upon the application of the officer, where no indemnifying bond has been given, or, if one has been given, on the application of the person who claims such property and has given such suspending bond as is hereinafter mentioned, or of the party issuing said process, may cause to appear before such court as well the party issuing such process as the party making such claim, and such court may exercise, for the decision of their rights, all or any of the powers and authority prescribed in the preceding section.

INJUNCTIONS.

6319. General Jurisdiction of Judges to Award Them.—Every judge of a circuit or corporation court or of a city

court having chancery jurisdiction shall have a general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be in or out of his circuit or city, or the party against whose proceedings the injunction be asked resides in or out of the same.

Motion to Dismiss.

(Copied from printed brief of counsel for Appellees in *Pepper* v. *Dixie Splint Coal Company, et al.*, in the Supreme Court of Appeals of Virginia, June Term, 1935.)

The appellees move to dismiss this appeal, and, for grounds for said motion, say:

The appellees' rights were prejudiced by the method adopted by the appellant in obtaining this appeal, and it should, therefore, be dismissed, for the following reasons:

First: After the lower court had rendered its decree herein, the appellee asked for a stay of execution, in order to prepare a petition for appeal. This stay was granted, and the counsel for the "Third" Dixie Splint Coal Company, a defendant in the trial court, against which alone judgment had been rendered, and hereinafter more fully described, went about preparing a petition for an appeal from said judgment, under the assumption that the appellant herein was also going to apply for an appeal.

Under date of April 16, 1934, counsel for appellees received the following letter from counsel for appellant:

"Bristol, Va., April 16, 1934.

Messrs. Greever & Gillespie,
Tazewell, Virginia,
Mr. John W. Flannagan, Jr.,
House Office Building,
Washington, D. C.

Gentlemen:

M-1321-A. P. Pepper *v.* Dixie Splint Coal Company, *et al.*

Mrs. Pepper found, after having the record made up in this case, that the cost of printing it was beyond her ability to pay, and hence she will not prosecute an appeal.

We accordingly will have Mrs. Pepper's judgment docketed, if it is necessary, and proceed for the collection of her judgment.

I have been told that the defendants desired an appeal, and if this is correct, I shall be obliged if you will notify me promptly. Incidentally, as I have stated, the record has been made up and paid for, and if you intend to appeal and desire it, Mrs. Pepper will be very glad to turn it over to you for the amount paid therefor, approximately $153.00. Please advise me promptly.

Yours very truly,

A. K. MORISON.

AKM/ms.

CC: Mr. Douglas Patterson, Bristol, Va. Mr. George M. Warren, Bristol, Va."

After receiving the above letter, it was decided not to proceed further with the preparation of the petition for appeal from the judgment against the "Third" Dixie Splint Coal Company, relying upon the representations of appellant that appellant would not appeal the case.

Thereafter, with no further notice to the defendants in the trial court, on August 16, 1934, the appellees were served with notice of appellant's application for an appeal. The date when appellant's petition for appeal was presented was three days before the expiration of the six months' period within which an appeal might have been granted said "Third" Dixie Splint Coal Company.

In part II of appellant's petition for appeal, under the heading "THE APPEAL", the appellant accepts the judgment against the "Third" Dixie Splint Coal Company, upon which judgment executions have heretofore been issued and levies made, and the entire property of the "Third" Dixie Splint Coal Company sold, and the "Third" Dixie Splint Coal Company utterly destroyed, and appeals from the final decree in part only, the appeal being taken against the "Second" Dixie Splint Coal Company, a partnership, and the "First" Dixie Splint Coal Company, a corporation.

For the appellant to be permitted to adopt this method of procedure is manifestly unjust and inadequate, for the

reason that the same individuals, in the main, were stockholders in both corporations and members of the partnership, and also because the appellant herein has thus been able to completely destroy the "Third" Dixie Splint Coal Company; and that Company, having relied upon the statement that appellant did not intend to appeal, thereby lost its right to petition for an appeal on its own account, and, not being a party to the appeal herein, the contention seems to be that it cannot assign cross-error against the appellant. It is submitted that this sort of practice by the appellant in this case should not be allowed.

To sustain the proposition that this appeal should be dismissed, the appellees cite the following authorities:

(Here follows quotations from *Gaines* v. *Merryman*, 95 Va. 660 (page 663); and *Wheeler, et al.*, v. *Thomas, et al.*, 116 Va., 259 (page 267).)

If it should be held that the foregoing statement of the procedure adopted by the appellant is not sufficient to justify a dismissal of the appeal, then, it is respectfully submitted, this Court will consider the whole record and do justice to all parties, including the "Third" Dixie Splint Coal Company, a Corporation, which the appellant evidently has tried to prevent.

SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1939.

Jean McNeil Pepper, Petitioner,
vs.
Scott Litton.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 4, 1939.]

Mr. Justice Douglas delivered the opinion of the Court.

This case presents the question of the power of the bankruptcy court to disallow either as a secured or as a general or unsecured claim a judgment obtained by the dominant and controlling stockholder of the bankrupt corporation on alleged salary claims. The judgment of the District Court disallowing the claim was reversed by the Circuit Court of Appeals (100 F. (2d) 830). We granted certiorari because of an apparent restriction imposed by that decision on the power of the bankruptcy court to disallow or to subordinate such claims in exercise of its broad equitable powers.

The findings of the District Court, amply supported by the evidence, reveal a scheme to defraud creditors reminiscent of some of the evils with which 13 Eliz. c. 5 was designed to cope. But for the use of a so-called "one-man" or family corporation, Dixie-Splint Coal Company, of which respondent was the dominant and controlling stockholder, that scheme followed an ancient pattern.

In 1931 Pepper, the petitioner, brought suit in a state court in Virginia against Dixie Splint Coal Company and Litton, the respondent, for an accounting of royalties due Pepper under a lease.[1] While this suit was pending and in anticipation that Pepper would recover, Litton caused Dixie Splint Coal Company to confess a judgment in Litton's favor in the amount of $33,468.89, representing alleged accumulated salary claims dating back at least five years. This was done by P. H. Smith, secretary and treasurer of Dixie Splint Coal Company, who, according to the

[1] During this litigation A. P. Pepper, the plaintiff, died and the suit was continued in the name of Jean McNeil Pepper, as his executrix.

District Court, was "an employee of Litton and subservient to the latter's will." This was on June 2, 1933. Execution was issued on this judgment the same day but no return was made thereon, Litton waiting "quietly until the outcome of the Pepper suit was definitely known". On February 19, 1934, Pepper obtained a judgment against Dixie Splint Coal Company for $9,000. On motion of the company, execution on the judgment was suspended for ninety days to permit an appeal. But defendant in that suit did not appeal.[2] Instead, on March 19, 1934, while execution on the Pepper judgment was suspended, Litton caused an execution to issue on his confessed judgment and levy to be made thereunder. Yet Litton "had no intention of trying to satisfy his confessed judgment" against his corporation "unless and until it became necessary to do so"; he was using it "only as a shield against the Pepper debt". Thus, when execution and levy were made March 19, 1934, no steps were taken for over two months towards a sale of the property on which levy had been made. On May 31, 1934, Pepper caused an execution to issue on her judgment, and levy was made June 2, 1934. On this latter date the sheriff "who seems to have been cooperating with Litton" advertised the property for sale under the Litton levy made in the previous March. On June 14, 1934, the sale was held and Litton became the purchaser of the property sold at the sum of $3,200.

The next step in the "planned and fraudulent scheme" was the formation by Litton of "another of his one-man corporations", Dixie Beaver Coal Company, to which Litton transferred the property he had acquired at the execution sale at a valuation of $20,135.36 to be paid for in stock of the new company.[3]

On September 4, 1934, the third step in Litton's scheme was taken. On that date Dixie Splint Coal Company, pursuant to a resolution of the board of directors, passed June 16, 1934, (two days after the Litton execution sale) filed a voluntary petition in bankruptcy. This step, according to the findings below, was "plainly for the sole purpose of avoiding payment of the Pepper debt". The

[2] Plaintiff, however, did appeal on certain phases of the case. See Pepper v. Dixie Splint Coal Company, 165 Va. 179.

[3] The resolution of the board of directors of this new company certified that in their opinion the property "formerly owned by Dixie Splint Coal Company and now owned by Scott Litton is worth $20,135.36 in current money of the United States and we fix the value of the same at this sum, which is to be paid for in stock."

bankrupt at that time had $4,500 on bank deposit and $12,000 in accounts receivable, most of which was good. The cash on deposit was then more than sufficient to pay all creditors with the exception of Pepper. And Litton caused the voluntary petition to be filed "feeling confident that his confessed judgment would cover and consume" the remaining assets. Adjudication followed on September 7, 1934.

Litton's next step in his scheme to defeat the Pepper claim was to purchase wage claims against the bankrupt and to cause "in some manner" other claims to be withdrawn. This was done, according to the District Court, so that Pepper might be made to appear as the only general creditor—a situation designed to give Litton a decided technical advantage, as we shall see.

On June 13, 1934, Pepper had instituted suit in the Virginia state court to have the Litton judgment declared void. On June 15, 1934, the day following the sale under the Litton execution, the sheriff instituted an interpleader action joining Litton, Pepper and the Clinchfield Coal Corporation and alleging, *inter alia*, that that corporation had a prior lien on all the property sold for a debt of $2,153. Litton and Pepper both answered admitting the prior lien of the corporation, Pepper answering "without prejudice to her rights" asserted in the chancery cause to have the Litton judgment set aside. On July 18, 1934, an order in the interpleader suit was entered directing payment of $2,153.00 to the Clinchfield Coal Corporation.

Thereafter the trustee, with the authority of the bankruptcy court, moved in the state court to set aside the judgment and to quash the execution thereof on the ground that the judgment was void since it had not been confessed in the manner required by the Virginia statute.[4] The court concluded that the Litton judgment

[4] At the first meeting of creditors held on September 26, 1934, the strategic position of Litton was further improved by two other events which later the District Court quite properly denounced. In the first place, P. H. Smith, secretary and treasurer of Dixie Splint Coal Company and the one who had caused the entry of the Litton judgment on June 2, 1933, by confession against the company, was elected trustee. In the second place, Smith was authorized to employ, and did in fact employ, as attorney for the trustee, one I. M. Quillen. Quillen, or his firm, was attorney for Dixie Splint Coal Company. As such he or his firm had prepared and filed the petition in bankruptcy for the company. And he appeared at the first meeting of creditors as counsel for the bankrupt and yet at that time, as attorney for Litton, filed the claim of Litton for $33,468.89 as a preferred or secured claim. And at the time these appointments were made the controversy between Pepper and Litton over the latter's judgment was known and recognized, although formal proof of the Pepper

was void but denied the motion on the grounds that the trustee was estopped to challenge it. The court held that Pepper in the interpleader suit had treated the fund derived from the execution sale under the Litton judgment as valid and consequently had elected to recognize the validity of the judgment. Since Litton had acquired, or caused to have withdrawn, all the remaining claims against the estate, the trustee in this suit was representing only Pepper. Therefore, since Pepper was estopped, so was the trustee. On appeal that judgment was affirmed on those grounds. *Smith* v. *Litton*, 167 Va. 263.

Thereafter the question of the allowance of the Litton judgment came before the bankruptcy court on exceptions previously made by Pepper. That court concluded that the decision by the state court that the trustee was estopped to attack the Litton judgment there, did not prevent the bankruptcy court from considering its validity. It therefore reviewed all the facts and concluded (1) that Litton and the Dixie Splint Coal Company had made a "deliberate and carefully planned attempt" to avoid "the payment of a just debt"; (2) that Litton and the Dixie Splint Coal Company were "in reality the same"; and (3) that the alleged salary claims underlying the Litton judgment did not represent an "honest debt" of the bankrupt corporation, being merely bookkeeping entries for the double purpose of lessening income taxes and of enabling Litton to appear

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claim was not filed until November 8, 1934. The grave impropriety of these appointments became striking as administration of the estate was commenced.

On October 6, 1934, Pepper moved in her state court action to quash all execution issued and outstanding on the Litton judgment. Quillen, attorney for the bankruptcy trustee, appeared in opposition to the motion, acting as attorney for Litton and contended that the intervention of bankruptcy had deprived the state court of jurisdiction. The state court reserved decision. On October 15, 1934, Pepper petitioned the referee to direct the trustee to contest the Litton judgment in the state court proceeding. Quillen, stating that he acted as attorney for Litton, opposed the petition. After some delay, new counsel for the trustee were obtained who soon asked the court for authority to institute a new and independent suit in the state court to have the Litton judgment declared void. This authority was granted.

The District Court, though condemning such steps, stated it did not suggest that Smith and Quillen were acting "with any fraudulent plan or intention of utilizing their positions in aid of Litton and to the detriment of the estate". Yet he denounced the impropriety of such conduct and emphasized the incompatible and conflicting positions which these persons occupied. On the professional ethics of the conduct of Quillen, the District Court aptly observed: "It is generally accepted that an attorney for the bankrupt should not be chosen attorney for the trustee in any case. And it is even more evident that an attorney who represents a creditor whose claim is under attack should not be chosen as attorney for the trustee who, on behalf of other creditors, is charged with the duty of making that attack."

as a creditor of the corporation in case it became financially involved.[5] Accordingly, the District Court disallowed the Litton claim either as a secured or unsecured claim and directed the trustee to recover for the benefit of the estate the property or its value which Litton purchased at the execution sale on June 14, 1934. On appeal the Circuit Court of Apeals reversed that judgment holding that the decision in the state court was *res judicata* in the bankruptcy proceedings.

We think that the Circuit Court of Appeals was in error in reversing the judgment of the District Court.

In the first place, *res judicata* did not prevent the District Court from examining into the Litton judgment and disallowing or subordinating it as a claim. When that claim was attacked in the bankruptcy court Litton did not show that the proceeding in the state court was anything more than a proceeding under Virginia practice to set aside the judgment in his favor on the ground that it was irregular or void upon its face. He failed to show that the judgment in the state court was conclusive in his favor on the validity or priority of the underlying claim, as respects the other creditors of the bankrupt corporation—a duty which was incumbent on him. On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there pre-

[5] This conclusion was based on the history and nature of the claims for salary. Litton's alleged claim of $33,468.99 represented $7,427.25 owed Litton and $26,041.64 owed P. H. Smith which the latter had assigned to Litton for $1 and "other considerations" which Litton was unable to recall. As we have noted, these claims date back over a number of years. The regular salaries paid Litton and Smith were entered on the corporation's books under a "payroll" account; the salary claims here in question were carried under separate accounts, "P. H. Smith—Personal" and "Scott Litton—Personal". No sums were paid Smith from that personal account. The District Court concluded that it was hard to believe that Smith, a bookkeeper and clerk, who had been paid $2700 a year, should, with no change in the nature of his work, receive a sudden increase in salary to $8,000 a year, except upon an understanding that it was merely for record purposes and not to be paid. This conclusion was strengthened by the fact that the $26,041.64 accumulated for over five years with no effort on Smith's part to collect it and by the fact that shortly before bankruptcy he assigned the claim to Litton for a nominal consideration. As to the $7,427.25 alleged to be owed Litton the court likewise concluded that it had been entered on the books for income tax purposes and was not a "bona fide obligation" of the company. Furthermore, a substantial part of these claims was barred by the statute of limitations. On the most tolerant assumption that could be made, according to the court, the salaries credited to Litton and Smith were merely contingent or conditional obligations not provable since they were intended to be paid only whenever the profits of the company permitted. Hence they were not fixed liabilities absolutely owing. See § 63(a)(1).

sented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles. The motion on which that proceeding was based challenged the Litton judgment on one ground only, viz., that it was void *ab initio* because it was not confessed by Dixie Splint Coal Company in the manner required by the Virginia statute and because P. H. Smith did not have either an implied or express power to confess it. In other words, in the state court, under the pleadings and practice, the only decree which was asked or could be given in the plaintiff's favor was for cancellation of the judgment as a record obligation of the bankrupt. It is therefore plain that the issue which the bankruptcy court later considered was not an issue in the trial of the cause in the state court and could not be adjudicated there.[6] Hence, the failure on the part of Litton to establish that the state judgment was *res judicata* plus his submission of his judgment to the bankruptcy court for allowance (as a preferred claim to the extent that it was secured by the alleged lien and as a common claim as respects the deficiency) plainly left the bankruptcy court with full authority to follow the course it took and to determine the validity of Litton's alleged secured claim and the priority which should be accorded it in the distribution of the bankrupt estate. In the second place, even though we assume that the alleged salary claim on which the Litton judgment was based was not fictitious but actually existed, we are of the opinion that the District Court properly disallowed or subordinated it.

Courts of bankruptcy are constituted by §§ 1 and 2 of the bankruptcy act (30 Stat. 544) and by the latter section are invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." Consequently this Court has held that for many purposes "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity". *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240. By virtue of § 2 a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the act, it applies the principles and rules of

[6] It should be noted that there is authority for the conclusion that the trustee is not necessarily precluded from questioning a judgment in the bankruptcy proceedings merely because he attacked it in a state court proceeding, where the state court did not pass upon the validity of the underlying claim. In re James A. Brady Foundry Co., 3 F. (2d) 437; Gilbert's Collier on Bankruptcy (4th ed.) § 1247.

equity jurisprudence. *Larson* v. *First State Bank of Vienna, S. D.*, 21 F. (2d) 936, 938. Among the granted powers are the allowance and disallowance of claims;[7] the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto;[8] the rejection in whole or in part "according to the equities of the case" of claims previously allowed;[9] and the entering of such judgments "as may be necessary for the enforcement of the provisions" of the act.[10] In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. *United States Fidelity and Guaranty Company* v. *Bray*, 225 U. S. 205, 217.

The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates.[11] They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done. By reason of the express provisions of § 2 these equitable powers are to be exercised on the allowance of claims, a conclusion which is fortified by § 57(k).[12] For certainly if, as provided in the latter section, a claim which has been allowed may be later "rejected in whole or in part, according to the equities of the case", disallowance or subordination in light of equitable considerations may originally be made.

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[7] Section 2(2). The sections are cited as they were at the time of the bankruptcy in this case. But the amendments made by the Chandler Act (52 Stat. 840), approved June 22, 1938, are not material so far as the issues here involved are concerned.

[8] Section 2(7).

[9] Section 57(k).

[10] Section 2(15).

[11] Thus the bankruptcy court has been held to have jurisdiction over a supplemental and ancillary bill to enjoin a creditor, after adjudication and discharge of the bankrupt, from prosecuting his claim in a state court. Local Loan Co. v. Hunt, *supra*. As a court in equity it has been held to have the power to protect the bankrupt estate against a fraudulent assessment; Cross v. Georgia Iron & Coal Co., 250 Fed. 438; to compel execution of a deed to make the bankrupt's equitable title a complete legal title; Dearborn Electric Light & Power Co. v. Jones, 299 Fed. 432; to recover assets of the estate which have been used to pay dividends under a composition order later reversed; In re Lilyknit Silk Underwear Co., Inc., 73 F. (2d) 52. And even though the act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, the bankruptcy court in the exercise of its equitable jurisdiction has power to permit claims to be proved thereafter in order to prevent a fraud or an injustice. Williams v. Rice, 30 F. (2d) 814; In re Pierson, 174 Fed. 160; Larson v. First State Bank, *supra*; Burton Coal Co. v. Franklin Coal Co., 67 F. (2d) 796.

[12] Section 57 (k) provides: "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

Hence, this Court has held that a bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. *Lesser* v. *Gray*, 236 U. S. 70. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature so far as provability is concerned, *Boynton* v. *Ball*, 121 U. S. 457, so the court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance. *Wetmore* v. *Markoe*, 196 U. S. 68. It may ascertain the validity of liens, marshal them, and control their enforcement and liquidation. *Isaacs* v. *Hobbs Tie & Timber Company*, 282 U. S. 734. And the bankruptcy trustee may collaterally attack a judgment offered as a claim against the estate for the purpose of showing that it was obtained by collusion of the parties or is founded upon no real debt.[13]

That equitable power also exists in passing on claims presented by an officer, director, or stockholder in the bankruptcy proceedings of his corporation. The mere fact that an officer, director, or stockholder has a claim against his bankrupt corporation or that he has reduced that claim to judgment does not mean that the bankruptcy court must accord it *pari passu* treatment with the claims of other creditors. Its disallowance or subordination may be necessitated by certain cardinal principles of equity jurisprudence. A director is a fiduciary. *Twin-Lick Oil Company* v. *Marbury*, 91 U. S. 587, 588. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Company* v. *Bogert*, 250 U. S. 483, 492. Their powers are powers in trust. See *Jackson* v. *Ludeling*, 21 Wall. 616, 624. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corportion is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes* v. *Anaconda Copper Mining Company*, 254 U. S. 590, 599. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain.[14] If it does

[13] Chandler v. Thompson, 120 Fed. 940; In re Thompson, 276 Fed. 313; In re Continental Engine Co., 234 Fed. 58. This is of course in absence of a plea of *res judicata*.

[14] This Court said in Twin-Lick Oil Company v. Marbury, *supra*, p. 590: "So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the

not, equity will set it aside. While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action,[15] it is, in the event of bankruptcy of the corporation, enforceable by the trustee.[16] For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation[17]—creditors as well as stockholders.

As we have said, the bankruptcy court in passing on allowance of claims sits as a court of equity. Hence these rules governing the fiduciary responsibilities of directors and stockholders come into play on allowance of their claims in bankruptcy. In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.[18] And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder. That is clearly the power and duty of the bankruptcy courts under the reorganization sections. In *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, this Court held that the claim of Standard

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aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness."

[15] Converse v. United Shoe Machinery Co., 209 Mass. 539. Davenport v. Dows, 18 Wall. 626. It is also clear that breach of that fiduciary duty may also give rise to direct actions by stockholders in their own right. Strong v. Repide, 213 U. S. 419. Cf. Green v. Victor Talking Machine Co., 24 F. (2d) 378.

[16] Section 70(a)(6); Manning v. Campbell, 264 Mass. 386; Stephan v. Merchants Collateral Corp., 256 N. Y. 418; Dean v. Shingle, 198 Cal. 652.

[17] See Wyman v. Bowman, 127 Fed. 257, 274; Burnes v. Burnes, 137 Fed. 781; Texas Auto Co. v. Arbetter, 1 S. W. (2d) 334, 339; McCandless v. Furland, 296 U. S. 140; Jackson v. Ludeling, *supra*, pp. 624 *et seq.*

[18] Thus in National Cash Register Co. v. Dallen, 76 F. (2d) 867, the bankrupt, prior to bankruptcy, turned in to petitioner an old cash register as a credit on account of the purchase of a new one. Pending delivery of the new machine, petitioner loaned the bankrupt another one and after the bankruptcy adjudication sought to reclaim the loaned machine. The court affirmed an order of the District Court allowing the reclamation on condition that petitioner first deliver to the bankrupt the old machine or pay the amount of its agreed value. The court said, p. 868, "We do not think it necessary to determine whether the contract for the purchase of the new cash register amounted to a bailment lease or a conditional sale. Bankruptcy courts may apply rules regulating equitable actions."

against its subsidiary (admittedly a claim due and owing) should be allowed to participate in the reorganization plan of the subsidiary only in subordination to the preferred stock of the subsidiary. This was based on the equities of the case—the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors. Similar results have properly been reached in ordinary bankruptcy proceedings. Thus, salary claims of officers, directors, and stockholders in the bankruptcy of "one-man" or family corporations have been disallowed or subordinated where the courts have been satisfied that allowance of the claims would not be fair or equitable to other creditors.[19] And that result may be reached even though the salary claim has been reduced to judgment.[20] It is reached where the claim asserted is void or voidable because the vote of the interested director or stockholder helped bring it into being or where the history of the corporation shows dominancy and exploitation on the part of the claimant.[21] It is also reached where on the facts the bankrupt has been used merely as a corporate pocket of the dominant stockholder, who, with disregard of the substance or form of corporate management, has treated its affairs as his own.[22] And so-called loans or advances by the dominant or controlling stockholder will be subordinated to claims of other creditors and thus treated in effect as capital contributions by the stockholder not

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19 In re Burntside Lodge, Inc., 7 F. Supp. 785. In that case the court said, p. 787:

"The relations of a stockholder to a corporation and to the public require good faith and fair dealing in every transaction between the stockholder and the corporation which may injuriously affect the rights of creditors and the general public, and a careful examination will be made into all such transactions in the interests of creditors.

"If the business had not been incorporated and the Cooks had conducted the enterprise personally, they would not have been allowed compensation for services in the event of bankruptcy, and there is no cogent reason why they should be paid when the same service is rendered as an officer and manager of a corporation of their own creation and to serve their own interests. To allow claims under such circumstances in effect would permit bankrupts to collect on claims against their own bankrupt estate. It would give effect to form rather than to substance, to the letter of the law rather than the spirit and purpose of it."

20 In re Wenatchee-Stratford Orchard Co., 205 Fed. 964.

21 In re McCarthy Portable Elevator Co., 196 Fed. 247, aff'd 201 Fed. 923.

22 In re Chas. K. Horton, Inc., 22 F. Supp. 905; In re Kentucky Wagon Mfg. Co., 71 F. (2d) 802; Forbush Co. v. Bartley, 78 F. (2d) 805; Clere Clothing Co. v. Union Trust & Savings Bank, 224 Fed. 363.

only in the foregoing types of situations but also where the paid-in capital is purely nominal, the capital necessary for the scope and magnitude of the operations of the company being furnished by the stockholder as a loan.[23]

Though disallowance of such claims will be ordered where they are fictitious or a sham,[24] these cases do not turn on the existence or non-existence of the debt. Rather they involve simply the question of order of payment.[25] At times equity has ordered disallowance or subordination by disregarding the corporate entity.[26] That is to say, it has treated the debtor-corporation simply as a part of the stockholder's own enterprise, consistently with the course of conduct of the stockholder. But in that situation as well as in the others to which we have referred, a sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant; a breach of the fiduciary standards of conduct which he owes the corporation, its stockholders and creditors. He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters.[27] He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do di-

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[23] Albert Richards Co., Inc. v. The Mayfair, Inc., 287 Mass. 280. Cf. Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209; Oriental Investment Co. v. Barclay, 64 S. W. 80 (Tex. Civ. App.); Joseph R. Foard Co. v. State, 219 Fed. 827.

[24] New York Trust Co. v. Island Oil & Transport Corp., 34 F. (2d) 655; In re H. Hicks & Son, Inc., 82 F. (2d) 277.

[25] See comment in 45 Yale L. Journ. 1471.

[26] In re Otsego Waxed Paper Co., 14 F. Supp. 15. The court said, p. 16, "The applicable principle is that, where a corporation is so organized and controlled as to make it a mere instrumentality or adjunct of another, and the subsidiary becomes bankrupt, the parent corporation cannot have its claim paid until all other claims are first satisfied." See also Hunter v. Baker Motor Vehicle Co., 225 Fed. 1006; Henry v. Dolley, 99 F. (2d) 94.

The same result has been reached in equity receiverships. Central Vermont Ry. Co. v. Southern New England R. Corporation, 1 Fed. Supp. 1004, aff'd 68 F. (2d) 460; S. G. V. Co. v. S. G. V. Co., 264 Pa. 265.

A fortiori that result is reached where there is a fraudulent purpose. E. E. Gray Corp. v. Meehan, 54 F. (2d) 223.

[27] See Alexander v. Theleman, 69 F. (2d) 610, 613.

rectly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandisement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.

On such a test the action of the District Court in disallowing or subordinating Litton's claim was clearly correct. Litton allowed his salary claims to lie dormant for years and sought to enforce them only when his debtor corporation was in financial difficulty. Then he used them so that the rights of another creditor were impaired. Litton as an insider utilized his strategic position for his own preferment to the damage of Pepper. Litton as the dominant influence over Dixie Splint Coal Company used his power not to deal fairly with the creditors of that company but to manipulate its affairs in such a manner that when one of its creditors came to collect her just debt the bulk of the assets had disappeared into another Litton company. Litton, though a fiduciary, was enabled by astute legal manoeuvering to acquire most of the assets of the bankrupt not for cash or other consideration of value to creditors but for bookkeeping entries representing at best merely Litton's appraisal of the worth of Litton's services over the years.

This alone would be a sufficient basis for the exercise by the District Court of its equitable powers in disallowing the Litton claim. But when there is added the existence of a "planned and fraudulent scheme", as found by the District Court, the necessity of equitable relief against that fraud becomes insistent. No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered it was the duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it. Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart.

The fact that Litton perfected his lien more than four months preceding bankruptcy is no obstacle to equitable relief. In the first place, that lien was but a step in a general fraudulent plan which

must be viewed in its entirety. The subsequent sale cannot be taken as an isolated step unconnected with the long antecedent events, all designed to defeat creditors. *Buffum, Trustee in Bankruptcy* v. *Peter Barceloux Co.*, 289 U. S. 227, 232-233. In the second place, Litton is seeking approval by the bankruptcy court of his claim. The four months' provision of the bankruptcy act is certainly not a statutory limitation on equitable defenses arising out of a breach of fiduciary duties by him who seeks allowance of a claim.

In view of these considerations we do not have occasion to determine the legitimacy of the "one-man" corporation as a bulwark against the claims of creditors.[28]

Accordingly the judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[28] On this point the District Court said: "An examination of the facts disclosed here shows the history of a deliberate and carefully planned attempt on the part of Scott Litton and Dixie Splint Coal Company to avoid the payment of a just debt. I speak of Litton *and* Dixie Splint Coal Company because they are in reality the same. In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation. It is a favorite device for the escape of personal liability. This case illustrates another frequent use of this fiction of corporate entity, whereby the owner of the corporation, through his complete control over it, undertakes to gather to himself all of its assets to the exclusion of its creditors."